266 *Extract from Annual Return of the Indian Territory Illuminating Oil Co., so Far as Its Business Pertains to Public Service, to the State Auditor of Oklahoma, Showing the Amount of Assessment Rendered, the First Equalization by the State Board, and the Last Equalization, the Latter Amount Being Extended on the Tax Rolls for Osage County, Oklahoma, for the Year* 1911.

| Name of township. | School dist. | Amount rendered. | First equalization. | Last equalization ext. tax roll. |
|---|---|---|---|---|
| Strike Axe (Dist. 12, in Caney Twp.) | 12 | 4,980.50 | 104,591.00 | 49,680.00 |
| Strike Axe | 13 | 6,918.30 | 145,284.00 | 69,209.00 |
| Black Dog (should be Bigheart Twp.) | 13 | 900.00 | 18,900.00 | 8,977.00 |
| Same | 28 | 14,309.80 | 300,505.00 | 142,740.00 |
| Same | 29 | 11,490.00 | 241,290.00 | 114,612.00 |
| Town of Bigheart | 29 | 3,095.60 | 650,081.00 | 308,788.00 |
| Bigheart Twp. (assessed as Black Dog) | 43 | 1,242.00 | 26,082.00 | 12,388.00 |
| Same | 35 | 8,088.90 | 169,864.00 | 80,565.00 |
| Totals Osage County | | 51,025.10 | 1,071,525.00 | 786,959.00 |

If rate of taxation is the same as last year 25.63/20 mills our tax in Bigheart will be $7,909.60—orig. cost of plant $4,136.41.

Gross Receipts at Bigheart Jan. 1 to Dec. 31, 1910, 3,061.51.

This includes gas to Southwestern Refinery which is located outside of town and has independent line not in system.

Rec-pt for Aug. Sept. & Oct. averaged about $100 per month for domestic purposes.

"Exhibit Number 2."

267 *Extract from Annual Return of the Indian Territory Illuminating Oil Co., so Far as Its Business Pertains to Public Service, to the State Auditor of Oklahoma, Showing the Amount of Assessment Rendered, the Last Equalization by the Board, the Latter Amount Being Extended on the Tax Rolls for Washington County, Oklahoma, for the Year* 1911.

| Name of township. | School dist. | Amount rendered. | First equalization. | Last equalization ext. tax roll. |
|---|---|---|---|---|
| Lincoln | 11 | 630.00 | ..... | 6,300.00 |
| Madison | 15 | 126.00 | ..... | 1,260.00 |
| Madison | 16 | 54.00 | ..... | 540.00 |
| Dewey | 6 | 1,800.00 | ..... | 18,000.00 |
| Jackson | 10 | 200.00 | ..... | 2,000.00 |
| Totals—Washington County | | 2,810.10 | ..... | 28,100.00 |

"Exhibit Number 3."

(Here follows assessment list for 1911, marked pages 268 to 280.)

prior thereto, furnishing some gas to a local corporation in the City of Bartlesville, which held a franchise for and was engaged in the business of selling gas to the residents and citizens of that city, and the same was true at the town of Ochelata, where the local distributing company was furnished certain quantities of gas for use in its business in selling gas to the inhabitants of that place.

VIII.

The Indian Territory Illuminating Oil Company had no local franchises at either Bigheart or Avant, for the distribution of gas, and was not engaged in the distribution and sale of gas to the citizens and residents of the other places mentioned.

IX.

By the terms of its contract with the Osage Indians, the Indian Territory Illuminating Oil Company, was required to furnish gas free to the Osage citizens and for use in the public institu-
286 tions of the Osages, under certain conditions named.

X.

Said Company has been and is primarily engaged in the business of Oil production in the territory covered by said lease with the Osage Indians, and has conducted its operations in the gas business as an incident to the development of the oil territory and the production of oil, and, to some extent, as a matter of accommodation to the citizens of Bigheart and Avant, and other persons residing along its pipe lines.

XI.

Said Company made a sworn return to the State Board of Equalization for the year 1911, of $53,835.10, as the actual fair cash value of that part of its property engaged in the public service, by reason of the gas business transacted by the Company. This valuation was raised by the State Board of Equalization to $538,350.00, by action of the Board on the 30th day of August, 1911.

XII.

Said Company returned its property to the local assessors of Osage and Washington Counties, for the year 1911, at $52,830.02, at which the same was assessed.

XIII.

All the property owned by said Company and used in the conduct of its business is located in Osage and Washington Counties, Oklahoma, and all its business operations are conducted in said State.

287 XIV.

The total value of said Company's stock, including all its property, tangible and intangible, on the first day of February, 1911, was $500,000.00.

XV.

The amounts returned by said Company to the local assessors of Osage and Washington Counties, and to the State Board of Equalization, do not include the lease, sub-leases, contracts and franchises of the Company, but only its physical properties, such as pipes, pipe lines and accessories, furniture, cash, account and bills receiveable, it being contended by said Company that its lease, sub-leases, contracts and franchises are not subject to taxation by the State of Oklahoma.

XVI.

The total value of the Indian Territory Illuminating Oil Company's property of every kind located in Oklahoma, over and above the amount locally assessed, was $447,169.98, on February 1, 1911.

XVII.

The gas business, as heretofore conducted by said Company, has not been, of itself, profitable, but it has been and is valuable as an adjunct to the Company's oil operations.

*Conclusions of Law.*

I beg leave to report the following conclusions of law in
288 this case, based upon the findings of fact as above set forth and stated.

I.

The Indian Territory Illuminating Oil Company is liable for taxation by the State of Oklahoma, for the full value of its property, tangible and intangible,—that is, for the sum of $500,000.00.

II.

I conclude that the Indian Territory Illuminating Oil Company is not exempt from taxation upon the theory that it is a Federal agent or that it holds a franchise from the Federal Government, but that the Act of Congress under which the contract with the Osage Indians was authorized and extended to the 16th day of March, 1916, was not entered into for the purpose of using said Indian Territory Illuminating Oil Company, as a Federal agent, or in the discharge of any governmental duty or function. In my opinion, the Act of Congress did not enlarge in any way, or in any way affect the powers of the Indian Territory Illuminating Oil Company, to make a contract. It was free to do that at any time, but this Act of Congress simply made the Osage Tribe of Indians eligible to enter into a contract on their part. The purpose of the Government was to see to it that said tribe of Indians was fairly dealt with and properly treated. They were allowed, with the supervision, and subject to the approval, of the Government, to make the contract for themselves. It was their contract, not the government's.

289

III.

Said Company in the transaction of its business in Oklahoma, is a public service corporation on account of the nature of the gas business transacted by it, and by submitting its report to the State Board of Equalization as a public service corporation, and admitting to that Board its liability to be assessed for taxation, by said Board, is estopped to deny that it is engaged in the public service.

IV.

That part of the property of said Company which is used in the production of oil and in the oil business, is not engaged in the public service, but the two kinds of business transacted by said Company, one dealing with oil and the other with gas, are so closely intermingled that it is impossible to say just what part of the total valuation of the Company should be assessed by the State Board of Equalization as engaged in the public service and what part should be assessed by the local assessors of the counties in which the property of the Company is located.

V.

It is immaterial so far as the amount of taxes that must be paid is concerned, or the manner of the payment of the taxes, or the time in which said taxes must be paid, whether the assessment of said Company is made by the State Board of Equalization or by the County Boards of the counties in which its property is located.

290

VI.

Said County Boards of Assessors, upon the report of said Company having assessed its property in those counties connected with the oil business, at $52,830.02, and that assessment having become final, it is fair and just that the remaining property of the Company should be assessed at the sum of $447,169.98, said sum being the difference between the total valuation of the Company's property and the amount returned to the local assessors of Osage and Washington Counties.

I recommend that a judgment be entered fixing the assessment upon the Indian Territory Illuminating Oil Company's property for taxation for the year 1911, at said sum of $447,169.98.

I have not kept an accurate account of time spent in the consideration of this case, but I have spent more than ten days' time in the hearing and consideration of the evidence, records, argument of counsel, and in the investigation of authorities connected with its determination, and I respectfully request the Court to make such order for my compensation as may be fair, all of which is respectfully submitted.

I return herewith a transcript of all the evidence taken before me as Referee in this case, and request that the same be considered as a part of this report.

R. M. CAMPBELL, *Referee.*

291 To which findings of fact and conclusions of law, the appellant duly excepted, and exception was duly allowed.

The appellant thereupon filed its written request for findings of fact and conclusions of law, and requested that they be approved and adopted as findings of fact and conclusions of law in this case, as follows, to-wit:

292 In the Supreme Court of the State of Oklahoma.

No. 3240.

In the Matter of the Assessment of the Indian Territory Illuminating Oil Company.

Appeal from the Decision of the State Board of Equalization.

Requests by the Indian Territory Illuminating Oil Company that the Honorable Referee herein find as follows as findings of fact and conclusions of law, and approves and adopts the same as findings in this case:

*Findings of Fact.*

First.

That the Indian Territory Illuminating Oil Company is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, duly authorized to do business in the State of Oklahoma and having its principal office and all of its business and property in the State of Oklahoma.

Second.

That in March, 1896, the assignor of said Indian Territory Illuminating Oil Company was granted a lease for mining purposes over the entire Osage Indian Reservation, by virtue of an Act of Congress of February, 1891, providing that such lands could be leased
293 for mining purposes in such quantities and upon such terms and conditions as the agent in charge of said Reservation may recommend, subject to the approval of the Secretary of the Interior. That said lease granted to said assignor the privilege or license to explore and mine said Reservation for oil and natural gas.

Third.

That prior to March 3, 1905, viz: in January, 1902, the Indian Territory Illuminating Oil Company became the owner of said lease and entered upon a policy of subleasing the same to various firms, individuals and corporations, so that at the time of the trial and hearing of this action there were one hundred and fifteen sub-lessees, and by December 21, 1904, there were six hundred and eighty thousand acres out of the whole reservation that were so subleased. Said

subleases, practically assigned to the sublessee certain parts of the territory with the right to explore for oil and yield a one-sixth royalty to the Indian Territory Illuminating Oil Company. Prior to March 3, 1905, the said company paid the Osage Indian tribe a royalty of one-tenth, but by the Act of Congress of March 3, 1905, complimented by the decision of the President making said royalty greater, the said Indian Territory Illuminating Oil Company was paying said Indian tribe one-eighth royalty since March, 1906, and therefore receiving for its own part of the royalty from said sublessees one twenty-fourth of the oil production.

Fourth.

That said lease would expire by its own terms in March, 1906, but by Act of Congress of March 3, 1905, the Congress of the United States extended said lease to the extent only of such portion as had been subleased, viz., 680,000 acres, as follows:

"That any allotment which may be made of the Osage Reservation, in Oklahoma Territory, shall be made subject to the
294 terms and conditions of the lease herein authorized, the same being a renewal as to a part of the premises covered by a certain lease dated March 16th, 1896, given by the Osage Nation of Indians to Edwin B. Foster, and approved by the Secretary of the Interior and now owned by the Indian Territory Illuminating Oil Company under assignments approved by the Secretary of the Interior, which said leases and all sub-leases thereof duly executed on or before December 31, 1904, or executed after that date based upon contracts made prior thereof, and which have been or shall be approved by the Secretary of the Interior to the extent of 680,000 acres in the aggregate are hereby extended for a period of ten years from the 16th day of March, 1906, with all the conditions of said original lease except that from and after the 16th day of March, 1906, the royalty to be paid on gas shall be one hundred dollars per annum on each gas well instead of fifty dollars as now provided in said lease; and except that the President of the United States shall determine the amount of royalty to be paid for oil. Such determination shall be evidenced by filing with the Secretary of the Interior on or before the 31st day of December, 1905, such determination; and the Secretary of the Interior shall immediately mail to the Indian Territory Illuminating Oil Company and each sublessee a copy thereof."

Fifth.

The Indian Territory Illuminating Oil Company was organized by promoters in 1902, at $3,500,000.00 capital stock, par value, and the lease was the sole consideration for said stock. Litigation ensued between the old owners and said promoters which resulted favorably to the old owners, and said owners took over said stock in lieu of said property. Said stock was transferred and distributed to the old stockholders or old owners about two years prior to the expiration of the lease in 1906, viz., in 1904, which was prior to the Act of Renewal by Congress of March 3, 1905.

Sixth.

That said stock had very little or no value at that time. There was no development on the property to any great amount and no great oil producers were found until June 22, 1904, when the first well was produced in the so-called Ochelata pool.

Seventh.

295 That in order to secure production and the drilling of wells and furnish cheap fuel, the Indian Territory Illuminating Oil Company laid some small two inch and three inch pipe-line on the surface of the ground and conducted gas from gas wells to its sublessees who were drilling wells. These lines were temporary and superficial, and so laid on the ground as to be easily removed from one point to the other; and said company furnished said sublessees gas for fuel for drilling wells and operating leases at a flat rate, or at a certain price per well, which resulted in a loss to said Indian Territory Illuminating Oil Company, as far as said gas operations were concerned; but that said lines were built primarily for the purpose of encouraging and securing development so as to comply with the terms of the original lease hereinbefore referred to.

Eighth.

That said company did not hold itself out as being able and willing to furnish said gas in such manner to all sublessees, but entered into a contract with each one separately, depending on the location of the drilling, the cost of laying said line, the proximity of the gas well and the desirability of securing development at the particular point in question, and that said business had been conducted by it with certain of its sublessees in the eastern part of the 680,000 acres, which were first developed, commencing in 1904.

Ninth.

That said company did not continue said business of piping gas to its sublessees in the western part of the 680,000 acres near Osage Junction, where the heaviest production was found, by reason of the expense and loss consequent upon the operation of that system.

Tenth.

296 That said company did not extend said lines in all instances, but it depended also upon the distance and the agreement between the parties and that a sublessee did not expect it on his part except as agreed to by the company. They were extended almost accidentally in the first instance and from time to time. The greater part of the production now has no surface lines but they carry on their own operations with their own gas, or from sources other than said company.

Eleventh.

That said company did not hold itself out at any time as being in the business of furnishing gas to sublessees, generally.

Twelfth.

Said lines were extended into the towns of Avant and Bigheart, being small settlements of people, but without any franchise granted to said company. The same were extended at the solicitation of said people, but with no promise or agreement on the part of the company to continue the same.

Thirteenth.

That the actual cost of said lines involved in this controversy, through which gas was so transported, was $7,668.91, and the company has conducted a gas business through said lines as herein indicated at a yearly loss to itself and without profit, except as such gas business may have induced development of the fields for oil.

Fourteenth.

The actual original cost of the gas line in Avant was $1,625.18; in Bigheart was $4,137.41, and the lines to the producers $70,918.32. These lines have been put in from time to time for five or six years prior to the hearing and were returned at $53,835.10. There-
297 fore, this referee finds the value of said lines at such time at $53,835.10.

Fifteenth.

Considered as a business and going concern, the Bigheart plant was and is worth $7,000.00, and the Avant plant was and is worth not more than $2,500.00.

Sixteenth.

Said company has no substantial, large pipe-line that will accommodate any large quantity of gas for any great distance.

Seventeenth.

That the total actual value of all the gas-pipe lines and similar physical property in said gas business is $53,835.10.

Eighteenth.

The gas business and the oil business in the office of said company is kept entirely separate, is easily accessible and easily ascertainable.

Nineteenth.

That the company showed its receipts and disbursements from the sale of gas in such business separate from oil for several years prior to the time of the hearing before the Board and down to May 31, 1911.

| | |
|---|---|
| For the year 1910 the receipts were | $35,947.45 |
| And disbursements | 41,700.89 |
| Showing a loss of | 5,753.44 |
| The loss by said company in said business for five years amounted to | 50,030.10 |

Twentieth.

298 That on the 22nd day of March, 1911, the said company duly filed with the State Auditor of the State of Oklahoma, as provided by law, a return and schedule of the amount and value of its property in the State of Oklahoma subject to taxation for the information of the State Board of Equalization in making its assessment of the property of said company, as provided by law. That said return was in regular form and showed a valuation of $53,835.10. That thereafter on the 18th day of April, 1911, Chas. F. Leach, manager of said company, appeared before said Board and gave his evidence with reference to the figures contained in said return. That the statement of said manager was confined to the gas pipe-line and gas business of said company and that his examination by the members of said Board was confined to said business and there was no intimation by said Board of including all the oil business of said company in an assessment to be made by said Board as a public service business.

Twenty-first.

Thereafter on May 16, 1911, said Board of Equalization, without any further testimony, and without notice, raised and fixed the assessment of said company at $1,130,535.00, but gave no reason to said company for said raise, nor the principle upon which it was based.

Twenty-second.

That prior to said hearing the said company had been yearly taxed as a public service corporation on said gas pipe-line solely.

Twenty-third.

That on the 29th day of June, 1911, the said company asked for and obtained a hearing before said Board and introduced the evidence of witnesses in its behalf, together with statements and figures

299 supporting such testimony, which was confined to said gas lines and gas business, until said Board then went into an inquiry as to the oil business of the company. The witness not being fortified at said hearing with reference to the figures concerning said oil business requested to be permitted to make a statement thereof and file the same, or to appear again before the Board, which was granted.

Twenty-fourth.

That on the 17th day of July, 1911, counsel for the company appeared before said Board and offered to enlighten the Board upon any subject that it desired with reference to said assessment.

Twenty-fifth.

That on the 2nd day of August, 1911, the said company submitted full, complete and ample statements of the oil business and gas business separately of the company for each year for several years prior to 1910, and also for the year of 1910. That said Board introduced no witnesses and did not ask or inquire further into the business of the company as disclosed by said statements.

Twenty-sixth.

On the 23rd day of March, 1912, the said company appeared before the Referee herein with its witnesses, who were duly sworn, and the State of Oklahoma introduced no evidence, and did not cross-examine the witnesses for said company with reference to said statements showing the separate nature of the gas and oil business, but all of which were introduced in evidence before this referee.

Twenty-seventh.

That said company is primarily in the oil business and the greatest part of its receipts and profits are from the royalties derived from the exclusive oil operations of its sublessees—being oil royalties exclusively.

300 Twenty-eighth.

That the Indian Territory Illuminating Oil Company received a royalty from oil alone from all its sublessees, being the one-twenty-fourth part, in 1910, to the value of.. $94,802.22

That it operated some oil leases directly itself for oil and received:

| | |
|---|---|
| From Lot Number 32 | 21,362.13 |
| From Lot Number 293 | 1,916.34 |
| From Lot Number 275 | 606.80 |
| So that its total income from oil alone for the year 1910 was | $118,687.49 |
| And the expense of such oil production was | 36,593.19 |

Twenty-ninth.

That from the leases that it operates itself it sells its oil direct to the pipe-line company and said company settles with the Indian Territory Illuminating Oil Company and the Osage Tribe of Indians separately, and as to said royalties account it is paid direct to the Indian Territory Illuminating Oil Company by the pipe-line company.

Thirtieth.

That said company has paid all taxes under the revenue law of the State of Oklahoma the same as other oil and gas companies, as is customary throughout the gas and oil country, and has returned its physical properties in the oil business to the local assessor and has paid its production tax from time to time.

Thirty-first.

301 That many of the sublessee companies under the Indian Territory Illuminating Oil Company on the Osage lease are very heavy producers of oil, to a much greater extent and volume than is said Indian Territory Illuminating Oil Company, and the value of said properties of said sublessees so engaged is far in excess of that of said Indian Territory Illuminating Oil Company, and that said companies do not pay taxes as public service corporations, and do not pay taxes on the value of their leases, but return and pay on their physical properties only.

Thirty-second.

That the said Indian Territory Illuminating Oil Company is now and has been at all times operating under said lease through said Act of Congress and under the Rules and Regulations of the Department of the Interior, introduced in evidence in this case, wherein and whereby said Department supervises the conduct of the business in the field with said Indian Tribe and the said Department of the Interior has its inspectors and other officers in charge.

The above request for special findings of fact presented to me this 10th day of Oct., 1912. Said findings numbered 15, 16, 17, 18, 19, 28, 30 and 32, respectively are allowed by me and made part of my report in said cause as findings of fact, and the State of Oklahoma is allowed an exception. The remaining special findings above set forth are disallowed and refused as findings of fact in said cause, and the Indian Territory Illuminating Oil Company is allowed an exception to such refusal. I beg to transmit all of said requested findings to the Court.

R. M. CAMPBELL, *Referee.*

302 *Conclusions of Law.*

First.

That the Indian Territory Illuminating Oil Company is not a public service corporation so as to be assessible by the State Board of Assessors in the State of Oklahoma. That its gas business, as disclosed by the evidence, is subsidiary to its oil business and is mainly for the purpose of facilitating the performance of the conditions of its lease of a part of the Osage Reservation renewed by Act of Congress, March 3, 1905.

Second.

That the small business accorded to and done with the scattered householders in Avant and Bigheart is too small for separate consideration as a public service, as there are no franchises and no obligations on the company to perform any duty and what gas is served in said places is subordinate to the demands and necessities of the field operators doing business under said governmental lease of license.

Third.

That the gas line and gas business of the Indian Territory Illuminating Oil Company employed and engaged in serving field operators under said lease is not a public service and should not be taxed as such.

Fourth.

That the value of the lines employed in said service to field operators is $70,918.32. That the value of the oil business, oil production or oil property of the Indian Territory Illuminating Oil Company should not be assessed by the State Board of Assessors
303 as a public service business. That the lease of the Indian Territory Illuminating Oil Company will expire in March, 1916, and that said company has no legal right to extension or renewal, and that the value of its intangible properties is very difficult to ascertain. That the larger value consists of the right of the said lessee of exploring for the oil and gas on a part of the property of said Indians Tribe—not vesting in the grantee any estate in the land or oil or gas but merely a license in the nature of an incorporeal hereditament.

Fifth.

That such right or license or privilege granted by said original lease so renewed by Act of Congress is not taxable under the laws of the State of Oklahoma, either by the local officers in the different counties or by the State Board, and the legislature of the State of Oklahoma has made no provision for the assessing and taxation of oil leases whether lying in public or private grant, except that the physical properties shall be assessed and taxed and a gross production tax paid by all oil companies.

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Sixth.

The Indian Territory Illuminating Oil Company operating under said lease is engaged as a Federal Agent, in a Federal business, within a jurisdiction controlled solely by Congress, as Congress has jurisdiction exclusively over commerce with Indian tribes, under the provision of the National Constitution quoted and relied upon in this case by the Indian Territory Illuminating Oil Company. That Congress in the conduct of the business and property of said Osage Tribe of Indians has seen fit, by Act of Congress, and without the consent or approval of any other person or body, to renew and grant this same original lease for ten years from March 16, 1906; that the operations and business conducted thereunder are under the direct supervision and superintendence of the Department of the
304 Interior and that the Osage Tribe of Indians have a far greater interest in the conduct of said business than has the Indian Territory Illuminating Oil Company, as the said Osage Tribe of Indians receives one-eighth of the royalty and the Indian Territory Illuminating Oil Company only one twenty-fourth.

Said lease grants the privilege, license or right to prospect for oil and gas and the occupation, business or operations of said company is the license or privilege so granted by the Federal government, and the State of Oklahoma is without authority to law a tax upon the operation, business or privileges of said Federal agent; except that said tax can be laid upon the physical property only of said agent. The valuation fixed by the State Board of Assessors in this case included all of said rights, grants, privileges and licenses.

The amount at which the property of the Indian Territory Illuminating Oil Company was fixed includes all these rights, and privileges and occupation commingled with the physical property and renders the whole assessment void.

The Referee recommends that judgment be entered declaring void the assessment of the Indian Territory Illuminating Oil Company.

Respectfully submitted,

INDIAN TERRITORY ILLUMINATING OIL CO.,
By JOHN H. BRENNAN, *Attorney.*

The above conclusions of law presented to me this 10th day of Oct., 1912, by Indian Territory Illuminating Oil Company, Appellant, with the request that they be approved and adopted as conclusions of law in said cause. Said request is refused and exceptions allowed to said Appellant. I beg to transmit the same to the Court for consideration.

R. M. CAMPBELL, *Referee.*

305 And upon the 10th day of October, 1912, the Honorable Referee, entered his orders as follows, to-wit:

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*As to Findings of Fact.*

The above request for special findings of fact presented to me this 10th day of Oct., 1912, said findings Numbered 15, 16, 17, 18, 19, 28 and 32 respectively are allowed by me, and made part of my report in said cause as findings of fact and the State of Oklahoma is allowed an exception. The remaining special findings above set forth are disallowed and refused as findings of fact in said cause, and the Indian Territory Illuminating Oil Company is allowed an exception to such refusal. I beg to transmit all of said requested findings to the Court.

R. M. CAMPBELL, *Referee.*

*As to Conclusions of Law.*

The above conclusions of law presented to me this 10th day of Oct., 1912, by Indian Territory Illuminating Oil Company, appellant, with the request that they be approved and adopted as conclusions of law in said cause. Said request is refused, and exceptions allowed to said appellant.

I beg to transmit the same to the Court for consideration.

R. M. CAMPBELL, *Referee.*

306 The appellant saved and was allowed its exceptions as indicated in the aforegoing orders.

307 In the Supreme Court of the State of Oklahoma.

No. 3240.

In the Matter of the ASSESSMENT OF THE INDIAN TERRITORY ILLUMINATING OIL COMPANY.

Appeal from the Decision of the State Board of Equalization.

*Motion for New Trial.*

Comes now the said Indian Territory Illuminating Oil Company, and moves the Honorable Referee to vacate and set aside his report of findings of fact and conclusions of law rendered herein, and to grant a new trial, for the following causes which affect materially the substantial rights of said appellant:

First. Irregularity in the proceedings of the Referee, or prevailing party, or any order of the referee, or abuse of discretion, by which the said appellant was prevented from having a fair trial.

Second. That the findings and report are not sustained by sufficient evidence, or is contrary to law.

Third. Error of law occurring at the trial and excepted to by the appellant.

Fourth. Error of the referee in refusing to allow and approve the requested findings of fact and conclusions of law made by appellant.

JOHN H. BRENNAN,
*Attorney for Appellant.*

308 The Referee overruled the aforesaid motion for new trial, to which plaintiff duly excepted, and exceptance was allowed.

309 Thereupon, appellant tendered this bill of exceptions to the action of the referee, in the various particulars therein set out, which is signed by appellant, and made a part of the record in this case, this the 11th day of October, 1912.

JOHN H. BRENNAN,
*Attorney for Appellant.*

We, the undersigned attorneys for the State of Oklahoma, appellee, in the above entitled cause, hereby waive the suggestions of any amendments to the foregoing bill of exceptions and waive the service of same on us, and hereby consent that the same may be settled and signed as a true and correct bill of exceptions in said cause, without further notice to us of the time and place of such signing and settling by the referee who tried said cause.

Witness, our hands, this the 11th day of October, 1912.

W. C. REEVES,
*Ass't Att'y Gen.,*
*Attorneys for Appellee.*

310 I, hereby certify that the above and foregoing bill of exceptions contains true, full, correct and complete copies of all the pleadings, motions, orders and proceedings had, made and rendered in said cause, and contains all the evidence, both oral and documentary, introduced or offered before me at the trial, or hearings of said cause, together with the objections of counsel thereto, the rulings of the referee thereon and exceptions thereto.

R. M. CAMPBELL, *Referee.*

311 I, R. M. Campbell, referee who tried the above entitled cause, do hereby certify that the above and foregoing has been presented to me as a true and correct bill of exceptions made in the cause above entitled, and it appearing to me that the same is a true and correct bill of exceptions in proper form,

Therefore, I do hereby settle, allow, certify and sign the same as a true and correct bill of exceptions in said cause, and order and direct that the same be, and is hereby made a part of the record in this case.

Witness my hand, in the City of Oklahoma City, Oklahoma County, State of Oklahoma, this the 11th day of October, 1912.

R. M. CAMPBELL, *Referee.*

Endorsed on back: Filed this 11th day of Oct. 1912. R. M. Campbell, Referee.

312 In the Supreme Court of the State of Oklahoma.

No. 3240.

In the Matter of the Assessment of the Indian Territory Illuminating Oil Company.

Appeal from the State Board of Equalization.

*Stipulation.*

Entered into by and between Charles West, Attorney General of the State of Oklahoma, appellee, and Brennan, Kane & Michaelson, Attorneys for Indian Territory Illuminating Oil Company, appellent.

313 In the Matter of the Assessment of the Indian Territory Illuminating Oil Company by the State Board of Assessors.

On the — day of ——, 1912, appeared before the Referee in the above entitled cause, John H. Brennan, (he having been previously duly sworn as a witness in this case) and stated that the proposition to assess the Indian Territory Illuminating Oil Company on its intangible assets, or lease, aside from its physical properties as an asset which should have been assessed any way, and upon which taxes should be paid regardless of the Public Service nature of the business—was a new question in the case as far as he was concerned, and thereupon the witness stated that the Indian Territory Illuminating Oil Company paid all its taxes on its physical properties and its gross production tax the same as any other oil company in the oil and gas fields in Oklahoma, and that the witness did not desire the Referee to understand that said Company was neglecting to pay taxes to any less extent than any other oil company and that the manner adopted and pursued by the Indian Territory Illuminating Oil Company in returning its property for assessment locally, viz: on its physical properties only and by paying the gross production tax was customary throughout the oil and gas bearing fields—that some of the sub-lessee companies in the Osage were worth more than the Indian Territory Illuminating Oil Company and that all said companies would escape the particular burden imposed in this case if such rule were followed as to this Company. That the witness was familiar with the manner of the assessment of oil companies in Osage, Washington and Tulsa counties particularly, and that he was interested as counsel in the tax ferret cases pending
314 which involve this very question.

Thereupon, the Assistant Attorney General objected to this testimony as incompetent, irrelevant and immaterial, and even if true would have no bearing upon liability of the Indian Territory Illuminating Oil Company.

I, R. M. Campbell, referee in the above entitled cause, hereby certify that the above and foregoing is a true and correct record of certain testimony taken and proceedings had before me in the trial of said cause, and said testimony was considered by me in making findings of fact and law in said cause. That by error, same was omitted from my record heretofore filed in said cause.

R. M. CAMPBELL, *Referee.*

It is hereby stipulated and agreed that the above and foregoing record of testimony and proceedings taken and had before the Honorable R. M. Campbell, the referee in the above entitled cause, and by error omitted from referee's report, and appellant's bill of exceptions, shall be considered a part of the record in said cause, the same in every particular as if included in the referee's return, and to be considered by the Supreme Court, the same and with equal force and effect as if included in the bill of exceptions of appellant heretofore filed in said cause.

CHARLES WEST,
*Attorney General;*
W. C. REEVES,
*Ass't Attorney General,*
*Attorneys for Appellee.*
BRENNAN, KANE & MICHAELSON,
*Attorneys for Appellant.*

Endorsed: No. 3240. In the Matter of the Assessment of the Indian Territory Illuminating Oil Company, Appealed from the State Board of Equalization. Stipulation. Filed Oct. 28, 1912. W. H. L. Campbell, Clerk. John H. Brennan, Bartlesville, Okla. (Sustained.)

315 And, thereafter towit, on November 12, 1912, there was made and entered the following order.

Supreme Court, September Term, 1912, November 12th, 1912, Twenty-fourth Judicial Day.

# 3240.

In re Assessment Ind. Ter. Ill. Oil Co.

And now on this day it is ordered by the Court that the stipulation filed herein on October 28, 1912, be, and the same is hereby allowed.

316 And thereafter, to-wit, on December 9, 1912, there was made and entered the following order.

Supreme Court, December Term, 1912, December 9th, 1912, Sixth Judicial Day.

# 3240.

In re Indian Territory Illuminating Oil Co., etc.

And now on this day the above cause is continued until the next term of court.

317 And thereafter, towit, on March 11, 1913, there was made and entered the following order.

Supreme Court, March Term, 1913, March 11th, 1913, First Judicial Day.

# 3240.

In re Assessment Property Ind. Ter. Ill. Oil Co.

And now on this day it is ordered by the Court that James B. Diggs, be allowed to file briefs amicus curiæ in the above entitled cause, instanter.

318 And thereafter, to-wit, on March 12, 1913, there was made and entered the following order.

Supreme Court, March Term, 1913, March 12th, 1913, Second Judicial Day.

# 3240.

In re Assessment Property Ind. Ter. Ill. Oil Co.

And now on this day the above cause is argued orally and submitted, and it is ordered by the Court that the Attorney General may file brief on or before March 20, 1913, on behalf of the State; it is further ordered by the Court that A. C. Cruce and Dillard & Blake be allowed until March 20, 1913 to file briefs amicus curiæ.

319 In the Supreme Court of the State of Oklahoma.

No. 3240.

In the Matter of the Assessment of the Indian Territory Illuminating Oil Company by the State Board of Equalization.

*Motion.*

Whereas, the above entitled matter was heretofore referred to R. M. Campbell, Referee, who has made and filed his report in this court, with his findings of fact and conclusions of law, and,

Whereas, a Bill of Exceptions was duly prepared and filed in this court showing at length that the Indian Territory Illuminating Oil Company duly made the requests, in writing, of said Referee, that he find certain facts and certain conclusions of law, which said findings of fact and conclusions of law so requested were set forth in said record herein, and,

Whereas, the said Company made a motion for a new trial before said Referee, which was denied—the said Referee substantially deciding all the conclusions of law against said Company and adopting some of said Company's proposed findings of fact, and,

Whereas, exceptions were taken by said Company to the refusal of said Referee to find as requested, and exceptions were duly taken to the findings of fact and conclusions of law finally filed by said Referee;

320 Now, therefore, the said Indian Territory Illuminating Oil Company, by its counsel, appears in the above entitled cause and moves said court to set aside the finding of fact and conclusions of law so made and entered by said Referee, and moves this court to find the facts and make conclusions of law as requested of said Referee by said Company. That for more specific reference to said findings of fact and conclusions of law made by said Referee, which said Company requests be set aside, reference is hereby made to the Bill of Exceptions filed in this court, and the same reference is hereby made for the specific requests by said Company to find the facts and the law in its favor as being set forth specifically by said Referee in his said report and said Bill of Exceptions, and that this Company moves this court to set aside the finding of said Referee and to hold that the assessment of said Company by the said State Board of Equalization was and is void.

Signed this 11th. day of March, 1913.

BRENNAN, KANE, MICHAELSON & McCOY,
*Counsel for Indian Territory Illuminating Oil Company.*

Endorsed: No. 3240. In the matter of the Assessment of the Indian Territory Illuminating Oil Company. Motion. Filed Mar. 25, 1913. W. H. L. Campbell, Clerk.

Acceptance of service. I hereby accept service of the within motion on this the 25th day of March, 1913. Chas. West, Attorney General. By W. C. Reeves, Asst. Atty. Gen.

321 And thereafter, to-wit, on March 10, 1914, there was made and entered the following order.

Supreme Court, January Term, 1914, March 10th, 1914, Twenty-fifth Judicial Day.

# 3240.

In re Assessment of the Property of the I. T. Ill. Oil Co., etc.

And now on this day it is ordered by the Court that the order of submission heretofore entered in the above cause, be, and the same is hereby set aside, and the cause is re-submitted as of this date.

# 3240.

In re Assessment of the Property of the Indian Territory Ill. Oil Co., etc.

And now this cause comes on for final decision and determination by the court upon the record and the briefs, and reports of the referee filed herein.

And the court having considered the same finds that the report of the referee in the above cause should be confirmed.

It is therefore ordered and adjudged by the court that the report of the referee in the above cause, be, and the same is hereby confirmed, and the judgment of this court is that the property of appellant be assessed as recommended by the referee in his report.

Opinion by Hayes, C. J.

Kane and Loofbourrow, JJ., concur; Turner J., concurs, except in last proposition discussed.

Williams, J: I dissent from that part of the opinion which holds that the State Board of Equalization has power to assess such property of the appellant as is not necessary to or reasonably incidental to the carrying on of its public service business. It is my opinion that all such property should be assessed by the local or county officer or board, and not the State Board. With this exception, I concur in the opinion.

322 Filed Mar. 10, 1914. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 3240.

In re Assessment of the Indian Territory Illuminating Oil Company.

*Syllabus.*

1. Evidence examined and held sufficient to sustain the finding of the referee that appellant is a public service corporation.

2. Section 21, article 10, Const., makes it the duty of the State Board of Equalization to "assess all railroad and public service corporation property." By the foregoing provision of the Constitution, it is made the duty of the State Board of Equalization to assess all the property of any public service corporation, including property not used in the public service, as well as that used in the public service.

3. An oil and gas mining lease which grants to the lessee the right and privilege to go upon land for the purpose of exploring for oil or gas and to produce oil and gas and transport the same from the leased premises in consideration of payment as royalty to the lessor a part of the oil discovered and a stipulated price for each well producing gas, does not vest in the lessee any estate in the land or oil or gas, but does grant a right or privilege in the nature of an incorporeal hereditament which appertains to the land.

4. By section 7541, Comp. Laws, 1909, all property in the state, whether real or personal, not exempted by statute or constitutional provision from taxation, is subject to taxation; and by section 7544, all rights or privileges that in any wise appertain to land are required to be taxed as real estate.

5. By reason of the foregoing statutes and section 7547, Comp. Laws, 1909, which requires all property to be assessed in the name of the owner thereof, an oil and gas mining lease should be assessed as the property of and in the name of the owner of such lease, and not as the property of and in the name of the lessor.

6. A statute of the state which authorizes and directs the levy of an ad valorem tax upon an oil and gas mining lease from the Osage Tribe of Indians, approved by the Secretary of the Interior and extended by an act of Congress upon lands of such tribe of Indians is not void upon the ground that the lessee or his grantee is a federal agent or upon the ground that such tax is a direct burden upon or interferes with the power of Congress to regulate commerce with the Indian tribes.

Appeal from the State Board of Equalization.

Hon. R. M. Campbell, Referee.

Affirmed.

Brennan, Kane & Michaelson and Hayes McCoy, Attorneys for Petitioner.

Charles West, Att'y Gen., and W. C. Reeves, Ass'nt Att'y Gen., Attorneys for the State.

Preston C. West, Gilbert & Bond, Stuart, Cruce & Gilbert, Dillard & Blake, James B. Diggs and Henry McGraw, Amici Curiæ.

323 *Opinion of the Court by Hayes, C. J.*

This is an appeal under Chapter 87, Laws, 1910, by the Indian Territory Illuminating Oil Company from the assessment made by the State Board of Equalization, whereby all the property of said company was assessed as the property of a public service corporation in the first instance at $1,130,535. Thereafter, after a hearing before said Board, said property was assessed at $538,350. The return made by the company to the State Board of Equalization for assessment showed the valuation of its property to be $53,835.10. The final assessment made by the State Board of Equalization raises the valuation of its property from said sum of $53,835.10 to $538,350. After the appeal had been perfected to this court, the cause was referred to the Hon. R. M. Campbell, of Oklahoma City, as referee in the case to report findings of fact and his conclusions of law thereon. Upon the evidence taken before him and facts agreed to by stipulation of the parties, the referee has filed his report, which we are asked by counsel for the State to confirm, and to which objections have been made by counsel for the company.

A consideration of the questions of law presented by the proceeding can be made more effectively by stating substantially the material facts found by the referee. The Indian Territory Illuminating Oil Company is a corporation, organized under and by virtue of the laws of New Jersey, with a capital stock of $3,500,000. On the 16th day of March, 1896, the company entered into a contract with one Edwin B. Foster, by the terms of which said Foster secured a blanket lease upon the lands in Oklahoma Territory, known as the Osage Indian Reservation, which granted to him the privilege of prospecting, drilling wells and mining and producing petroleum and natural gas. This lease, which was for a period of ten years, was approved by the Secretary of the Interior, and would have expired March, 1906; but, under an act of Congress, of date March 3rd, 1905,

324 (33 U. S. Stat. at L. p. 1061), this lease was extended as to 680,000 acres of said land for a further period of ten years from the date of its original expiration, and by the terms of said extension, will expire on the 16th day of March, 1916. Prior to the time said lease was extended, the Indian Territory Illuminating Oil Company acquired the lease from the original lessee, and had sublet

to one hundred or more persons and corporations most of the lands covered by the lease as extended on March 3rd, 1905; and operations on said land for discovering and producing oil have been and are being conducted largely by such lessees. A small portion of said tract—the amount of which is not made to appear from the evidence, or from the findings of the referee—is operated by the company. By the terms of the lease contract with the Osage Tribe of Indians, as extended, the sublessees are requird to pay a royalty of one-sixth of the oil produced by the property covered by the lease, of which one twenty-fourth goes to the company, and three twenty-fourths, or one eighth, to the Osage Indians. The payments to the Osage Indians are made to the United States Indian Agency for the Osage Indians at Pawhuska, under and by virtue of rules and regulations promulgated by the Department of the Interior. The company has laid pipe lines upon and across the lands covered by the lease for conveying natural gas, and has been engaged in furnishing natural gas to its sublessees for use as a fuel for drilling and pumping operations in drilling and producing oil and gas upon said leased premises; and the company has been further engaged in furnishing gas for domestic consumption to the citizens and residents of two small towns, located in said reservation adjacent to the lines of the company, and was engaged in furnishing gas to other customers whom we need not mention in detail. The company has been and is primarily engaged in the business of oil production in the terri-
325 tory covered by said lease. It owns as lessee the lease contract with said Indians, and as the lessor, owns lease contracts from a number of sublessees engaged in developing and producing oil and gas upon a portion of said leased lands. The company, by its sworn return to the State Board of Equalization for the year 1911, fixes the value of its property at $53,835.10. For the same year, it returned property to local assessors of Osage and Washington counties, valued at $52,832.50, at which amount the property returned to the local authorities by said company was assessed. All the property owned by the company is located in said Osage and Washington counties, and all its business operations are conducted in this state. The referee found the total value of all the property of the company, including its tangible and intangible property on the first day of February, 1911, to be $500,000. From this amount, he deducted the amount of the property assessed locally and found *that* the value of the property which should be assessed by the State Board of Equalization for the year 1911 to be $447,169.98.

The company, in making its return to the State Board of Equalization of its property listed only its physical properties, employed in the gas business. There is no controversy or contention about the value of the physical properties and the value of said properties has been assessed at $53,835.10. In determining the value at which the company's property should be assessed, the referee took into consideration the value of the lease above mentioned held by the company on lands of the Osage Tribe of Indians, as heretofore mentioned. The contentions made by the company why the report of the referee should not be confirmed are: First. It is not a public service corpo-

ration, and therefore the State Board of Equalization was without authority to assess its property. Second. That its oil and gas leases are not property used in any public service rendered by it, and therefore are not subject to assessment by the State Board of Equalization. Third. That leases for prospecting and for the development and for producing oil and gas are not subject to taxes in the
326 hands of the lessee or his assignees under the statute of this state; and, Fourth. That in exercising its rights under its lease from the Osage Tribe of Indians, approved by the Secretary of the Interior and by act of Congress in extending said lease, the company is a federal agency, or exercises a privilege or franchise granted by the Federal Government; and such lease, therefore, is not subject to taxation by the State.

We shall consider these contentions of appellant in their order. By section 34, article 9 of the Constitution, the term "public service corporation" is defined as follows:

"The term 'public service corporation' shall include all transportation and transmission companies, all gas, electric light, heat and power companies, and all persons authorized to exercise the right of eminent domain, or to use or occupy any right of way, street, alley, or public highway, whether along, over, or under the same, in a manner not permitted to the general public."

It is the contention of appellant that the foregoing definition of the term "public service corporation," although it specifically provides that all gas companies shall be deemed included by said term, it was not intended to include gas companies engaged in developing, manufacture or transportation of gas for the purpose of supplying only the persons or companies engaged in such production, manufacture or transportation. In other words, it was meant to include only those companies engaged in the manufacture, production or transportation of gas for use by the public. If we assume that this contention be correct, we are of the opinion that the finding of the referee that appellant is a public service corporation should not be set aside. The articles or charter of incorporation of appellant are not introduced in evidence; nor is there any other evidence to disclose just what are the charter powers of appellant; but there is evidence that it is engaged in rendering service to the general public in two different towns, in that it furnishes to the inhabitants of said towns generally gas for their consumption; and appellant, acting through its officers, has attempted to submit itself to the jurisdiction of the State Board of Equalization by making a return
327 as a public service corporation of a portion of its property to said board for assessment. In other words, the position of the company up to the time the State Board of Equalization raised the assessment of its property, was in the attitude of admitting that it is a public service corporation, because it voluntarily submitted a portion of its property to the Board for assessment as such a corporation. In Wyman on Public Service Corporations, sec. 243, it is said:

"That the business of supplying gas is public in character is now

universally recognized, provided that the company supplying is committed to supplying gas to the community in general."

It is true that it appears from the evidence that many of the lines of appellant company are temporarily laid, and that outside of certain towns, service is not rendered to the community in general, but only to sublessees of appellant company and to a few other persons along the lines of said company to whom service is rendered under private contract with the persons supplied; but in the towns mentioned, it appears that services rendered are to all members of the public seeking same. Under this state of the evidence, we are of the opinion that the finding of the referee that appellant company is a public service corporation should not be disturbed.

Section 21, article 10 of the Constitution, creates a State Board of Equalization, and provides which of the state officers shall constitute its members and defines the duties of said board. Among the duties prescribed are that "they shall assess all railroad and public service corporation property." It is contended that this provision does not authorize the State Board of Equalization to assess property of a public service corporation which such corporation does not use in rendering its public service. This contention, we do not think, can be sustained, either by the letter of the Constitution or by any implied meaning from the foregoing provision of section 21, article 10. The language of that provision is not that the State
328 Board of Equalization shall assess all public service property, or all property engaged in a public service, but that it shall assess all public service corporation property. The meaning of this provision will not be changed, in our opinion, if it be paraphrased to read: "They shall assess all property of railroad and public service corporations." Had it been intended to limit the power and duty of the Board in assessing the property of public service corporations to assess only the property used in connection with the public service rendered by the company, then it would have been provided that said Board should assess all public service property. It may be urged that no reason exists why property of a public service corporation not used in connection with any public service rendered could not be assessed by the local authorities more satisfactorily than by the State Board of Equalization, and that it was intended to leave such power in the local authorities, or at least to leave it within the power of the Legislature to commit such authority to the local authorities; but such a dual system of assessment would often lead to complications that would almost, if not entirely, render the system impractical and afford easy opportunity for property to escape taxation. A telephone company, which by the Constitution is defined to be a public service corporation, may own a building, one story or one room of which is used by the company in rendering its service to the public; the remainder of the building is used for rental purposes and devoted entirely to private business. Under these circumstances, whose duty would it be to assess such property? In the instant case, wells have been drilled under the same lease, some of which produce oil, and others of which produce gas. The gas is used by the company in rendering its

public service; the oil is used in an entirely private business, and in no way in connection with the service rendered to the public. Assuming that these leases are subject to taxation, the value
329 thereof is partly determined by the wells producing oil, and partly by the wells producing gas. Under the dual system of assessment, who would have power to assess these leases; the local authorities, or the State Board of Equalization? and what part of the value of the lease should be assessed by the local authorities, and what part by the State Board of Equalization? We think, when the framers of the Constitution said that all public service corporation property shall be assessed by the State Board, they meant to say more than that all public service property should be assessed by such Board; and they meant to avoid the very confusion which this case would present, if it had made it the duty of the State Board of Equalization to assess only the property of such corporation as is used in the public service, and left it to the local authorities to assess all other of its property.

The lease of appellant company from the United States government and the Osage Tribe of Indians does not convey any title to the oil and gas in situ under the leased premises to appellant company; it grants only the right or privilege to go upon said leased premises and prospect for oil and gas and reduce the same to possession and transport it from the premises for the consideration that appellant company shall pay to the Osage Indians as a royalty one-sixth of the oil produced upon the property covered by the lease. It is clear, under the decisions of this court, which are in harmony with the weight of judicial decisions, that such lease grants no right or title to the oil and gas in situ or any estate in the fee, but that such oil and gas, until reduced to possession, remains a part of the freehold, and the property of the owners of the freehold. Duff et al. v. Keaton et al., 33 Okla. 92; Frank Oil Co. v. Bellview Oil & Gas Co., et al., 29 Okl. 719; Kolachny v. Galbreath, 26 Okl. 772.

In the case first mentioned above, the court, speaking through Mr. Justice Williams, said:
330 "The rule seems to be settled in this jurisdiction that the grant of an exclusive privilege to go upon land for the purpose of exploring for oil or gas, the grantor to receive part of the oil or gas mined, does not vest in the grantee any estate in the land or oil or gas, but is merely a license or grant; such a lease creating an incorporeal hereditament only, and the lessee having no right or title to the oil or gas lying under the surface of the land. Thus, under our statute, is simply a chattel real."

Under this rule, it is clear that the oil and gas in situ may not be assessed as the property of the lessee; and it is not attempted in this proceeding to assess such against appellant company, but it is the contention of the state that the right or privilege to go upon the lands leased and produce oil and transport it is property that possesses great value, and is subject to be assessed for taxes. In opposition to this contention of the State, counsel for the appellant company, in exhaustive briefs, have cited a great number of decisions from other states; but they are without direct bearing upon the

question here involved, because most of them arose under statutes unlike the statutes in this state controlling the present case. Section 7541, Comp. Laws, 1909, provides:

"All property in this state, whether real or personal, including the property of corporations, banks, and bankers, except such as is exempt, shall be subject to taxation."

And section 7544 provides:

"Real property, for the purpose of taxation, shall be construed to mean the land itself and all buildings, structures and improvements or other fixtures of whatever kind thereon, and *all rights and privileges thereto belonging or in any wise appertaining and all mines, minerals, quarries and trees on or under the same.*" (Italics ours.)

It is under the italicized provision of the foregoing statute that the state contends leases granting to lessees the right to prospect for, drill, produce and transport oil and gas from leased premises are rendered subject to taxation as real property, for the reason that such leases convey rights and privileges appertaining to the land. In opposition thereto, the appellant company invokes the rule of statutory construction, that all tax acts must be construed strictly, and if there is ambiguity in the language of the act, resulting in doubt whether the intent exists to levy a tax on a given thing or class of property, the doubt must be resolved in favor of the tax-payer. This rule is well recognized by the authorities: American Net & Twine Co. v. Worthington, 141 U. S. 468; Rice v. United States, 4 C. C. A. 104; Crabtree et al. v. Madden, 54 Fed. 427; State v. Ashbrook, 77 Am. St. 765 (Mo.); 26 Am. & Eng. Encyc. of Law, 2d ed. 669; Cooley on Taxation, 266.

331

We are doubtful, however, whether the rule should be applied to section 7544, if the language of such section alone was so ambiguous as to result in a doubt as to its meaning; for, by section 7541, supra, it is commanded that all property in the state, whether real or personal, except such as is exempted, shall be subject to taxation. Since there is no provision of the statute providing that such rights and privileges as are conveyed by oil and gas leases shall be assessed and taxed as personal property, unless section 7544 authorizes their assessment and the levy of taxes thereon as real property, the plain unmistaken intent and requirement of section 7541, that all property in the state shall be subject to taxation cannot be accomplished. Section 7544, therefore, should be construed in connection with the other provisions of the statute, and with a view of carrying out the purpose of the statute, made plain by its other provisions. But, to our minds, section 7544 possesses but little, if any, ambiguity, and conveys the meaning within its own terms that it is intended that every right and privilege appertaining to land shall be assessed as real property. That an oil and gas mining lease, authorizing the lessee or grantee to go upon the leased premises and to prospect thereon for oil and gas and reduce the same to the lessee's possession grants to the lessee a right and privilege appertaining to the land in the nature of an incorporeal hereditament, has been determined by this court: Kolachny v. Galbreath, supra; Frank Oil Co.

v. Bellview Oil & Gas Co., et al., supra; Duff et al. v. Keaton et al., supra.

332 It is true that until the gas or oil is discovered and reduced to possession by the lessee or grantee under the lease, it remains a part of the fee and the property of the lessor or the owner of the fefe; but the ownership of said oil and gas after the lease is executed does not retain to the owner of the fee all the rights and privileges that he held before the execution of the lease; for, before the execution of the lease, the owner of the fee not only owned the oil and gas in situ, but the right to explore therefor and to reduce it to his possession; but, after the execution and delivery of a lease, he no longer, for the period of said lease, owns such right and privilege. Such right and privilege is vested by the lease in the lessee or grantee under the lease. This right and privilege, as is a matter of general knowledge, often exceeds in value many times the value of the land itself. It is also a fact of common knowledge that these rights and privileges constitute a large volume of the property upon the market of this state as a subject of barter, sale and transfer; that they constitute frequently the subject of litigation and demand and receive the protection of the judicial and executive departments of the government. To say that such rights and privileges are not property, would seem to require us to ignore the existence of every essential element of property.

In Harvey Coal & Coke Co. v. Dillon et al., 59 W. Va. 605, 6 L. R. A. (N. S.) 628, the court had under consideration the taxation of a lease that granted to the lessee the right to enter upon the surface and use so much thereof as might be required in mining coal and making coke. The Constitution of West Virginia requires that all property, both personal and real, shall be taxed, and by a statute, chattels real are required to be taxed as personal property. In deciding that the lease involved in that case was property and subject to taxation, it was said:

333 "Anything capable of beneficial ownership is property,—in this instance a valuable right arising by contract, a right to take coal from the body of land, using the land for that purpose, and convert it into salable coal, a commodity of great commercial value. 'Man's rights in respect to things constitute property.' 2 Minor Inst. 1. The company's right to produce commercial, merchantable coal for market and manufacture coke is a right in respect to the land, and that mere right, under the contract, is property."

In Graciosa Oil Co. v. Santa Barbara County, 99 Pac. 483, the Supreme Court of California had under consideration the taxation of an oil and gas mining lease, the terms of which, in many respects, were similar to the terms of the lease under consideration in this case. The lease in that case, as in the instant case, did not convey any estate in the oil or gas in situ under the surface of the land covered by the lease, but conveyed the right to go upon the land and use the surface thereof in prospecting and mining for oil and gas. The statute of California, defining real estate for the purpose of taxation, is as follows:

"The term 'real estate' includes: (1) The possession of, claim to,

ownership of, or right to the possession of land. (2) All mines, minerals, and quarries in and under the land, all timber belonging to individuals or corporations, growing or being on the lands of the United States, and all rights and privileges appertaining thereto."

The court held that under both these definitions of real estate, the rights and privileges granted by an oil and gas lease constituted real estate, subject to taxation.

In Texas Co. v. Daugherty et al., 160 S. W. 129, the court of Civil Appeals of Texas construed and applied to an oil and gas mining lease a statute of that state which defined real estate for the purpose of taxation as follows:

"Real property, for the purpose of taxation, shall be construed to include the land itself, whether laid out in town lots or otherwise, and all the buildings, structures and improvements, or other fixtures of whatsoever kind thereon, and all the rights and privileges belonging or in any wise appertaining thereto, and all mines, minerals, quarries and fossils in and under the same."

The court held that it is immaterial whether the lease under consideration conveyed any title to the lands or any title to the oil or gas beneath the surface until the same was severed from the
334 land, for that in all events the lease did grant "rights and privileges belonging or * * * appertaining" to the lands upon which the leases were given, and were therefore taxable under said statute as real estate.

The foregoing cases appear to us to be in point, and the decisions therein reached, sound. It will not do to say that because the lease leaves the title to the oil in the landowner until it is brought to the surface and no estate is vested in the lessee in the oil or gas until it is extracted and removed from the land that the lessee does not acquire any property by virtue of his lease, and that all the property rights pertaining to the land leased remain in the owner of the fee. After oil or gas is discovered, the combined values of the lease and of the land become frequently very great; but the royalty fixed by the lease executed before the discovery of the oil is ordinarily small, and no one would think of measuring the value of the property of the owner of the fee for the purpose of taxation, or for the purpose of sale at the combined value of the rights of the lessee and of the lessor. The value represented by the royalty and of the land, as before stated, is often small, compared to the value of the rights of the lessee. The statute not only commands that all property, except such as is specifically exempted from taxation shall be assessed and taxed each year, but commands, also, that it shall be assessed in the name of the owner thereof. Sec. 7547, Comp. Laws, 1909. If the mandate of this statute is to be observed, the right, privilege or interest appertaining to any land conveyed by an oil and gas mining lease must be assessed in the name of the owner of the lease.

Our conclusions upon the foregoing propositions bring us to appellant's fourth contention, which, to our minds, involves the most difficult question presented by this case.

It is admitted by all parties that the land covered by the original lease to Foster and assigned by him to appellant was within the

reservation of the Osage Tribe of Indians, and that the title
335 thereto belonged to said Tribe of Indians at the time of the execution and assignment of said lease. It is also admitted that the 680,000 acres of land on which the lease was renewed by the act of March —, 1905, was at said time a part of the reservation owned by said tribe of Indians. Subsequently, on March 28, 1906, Congress passed an act known as the Osage Allotment Bill, which provided for the allotment of the lands of the Osage Tribe of Indians to the individual members of said tribe. 34 U. S. Stat. at L. p. 539. But section 3 of said act provides that the oil, gas, coal and other minerals covered by the lands for the selection, division and allotment of which provision is made in the act are reserved to the Osage Tribe of Indians for a period of twenty-five years from and after the 8th day of April, 1906, and leases for all oil, gas, and other minerals covered by the selection and division of the land provided for in the act may be made by the Osage Tribe of Indians through its tribal council, and with the approval of the Secretary of the Interior, and under rules and regulations as he may prescribe. The amount of royalty shall be determined by the President, and shall be paid into the treasury of the United States to the credit of the members of the Osage Tribe of Indians as other moneys of said tribe are to be deposited under the provision of said act, and said royalties shall be distributed to the individual members of the tribe according to the rules provided in the act at the time and in the manner provided for the payment of other moneys held in trust by the United States for said tribe. One of the provisions of said act is, that nothing therein contained shall be construed as affecting any valid existing lease or contract. Such provision was evidently enacted for the purpose of protecting the lease and renewal thereof here under consideration. By reason of this act, the gas, oil and other minerals under
the lands remained the property of the said tribe, and the
336 plenary power of Congress over such property of the tribe, in view of the numerous decisions of the court upon the power of Congress over the property of the Indian Tribes, cannot be questioned. Tiger v. Western Inv. Co., 221 U. S. 286; Lone Wolf v. U. S., 187 U. S. 553; Stephens v. Cherokee Nation, 174 U. S. 445; Choctaw Nation v. United States, 119 U. S. 1; Jefferson v. Winkler, 26 Okl. 653.

Appellant's fourth contention, therefore, is that it is an agent of the federal government in the administration of said property, and that any attempt of the state to tax the value of its lease is void, for the reason that it is an attempt to tax a federal agency or to tax a privilege or franchise granted by the federal government. It is well settled that while the state may lay a tax upon the property of a federal agent, that it cannot levy a tax upon the operation of such agent; and that where a privilege or franchise has been granted by the United States, which it has constitutional power to grant, such franchise cannot be made the subject of state taxation: Union P. Ry. Co. v. Peniston, 18 Wall. 5, 21 L. Ed. 787; Telegraph Co. v. Texas, 105 U. S. 460, 26 L. Ed. 1067; California v. Central Pac. Ry. Co., 127 U. S. 1.

Applying the foregoing legal principles, it has become well settled that a state may not burden interstate commerce by levying a tax thereon. Numerous cases supporting this rule may be found cited in United States Express Co. v. Minnesota, — U. S. —, 56 L. Ed. 459. The same section of the Constitution, to-wit: section 8, article 1, that confers upon Congress the power to regulate interstate commerce, also confers upon Congress power to regulate commerce with the Indian tribes; and unquestionably, a law of a state that attempts to levy a tax that would be a direct burden upon commerce with the Indian tribes or an interference therewith would be void. No general statement of the law applicable in all cases has ever been formulated by the courts in the various opinions rendered upon this question. In Postal Telegraph Co. v. Adams, 155 U. S. 688,
337 it was said:

"It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a state on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained. But property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a state, and may take the form of a tax for the privilege of exercising its franchises within the state, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the state, (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon,) and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes. The corporation is thus made to bear its proper proportion of the burdens of the government under whose protection it conducts its operations, while interstate commerce is not in itself subjected to restraint or impediment."

In Thomas v. Gay, 169 U. S. 264, the validity of a statute of the Territory of Oklahoma, assessing and levying a tax upon cattle belonging to a person not a resident of the Territory, but who graze said cattle upon the Osage Indian Reservation under a lease thereon for grazing purposes, was questioned. It was contended that the attempt of the territorial legislature to levy a tax upon such cattle was an interference with the congressional power to regulate commerce among the Indians. The court, in deciding against this contention, said:

"The unlimited power of Congress to deal with the Indians, their property and commercial transactions, so long as they keep up their tribal organizations, may be conceded; but it is not perceived that local taxation, by a state or territory, of property of others than Indians would be an interference with Congressional power. * * * The taxes in question here were not imposed on the business of grazing, or on the rents received by the Indians, but on the cattle as property of the lessees, and, as we have heretofore said that as such a

tax is too remote and indirect to be deemed a tax or burthen on interstate commerce, so it is too remote and indirect to be regarded as an interference with the legislative power of Congress."

An ad valorem tax, levied upon the right or property of appellant acquired under its lease from the Osage Tribe of Indians or from Congress, is not a tax levied upon the land of the tribe; nor upon the oil and gas as a part of said land; nor is it levied upon any property of the Indians. If the statute undertook to levy a tax upon the royalties the Indian Tribe receives, then it might be suggested with reason that it constitutes a tax upon the property of the
338 Indian tribe. Nor is it a tax imposed upon the business of prospecting for and developing oil and gas. The payment of the tax is not made a condition precedent to the right of appellant to carry on its business.

Our attention has been called to section 3, article 1 of the Constitution, which provides that:

"The people inhabiting the state do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States. Land belonging to citizens of the United States residing without the limits of the state shall never be taxed at a higher rate than the land belonging to residents thereof. No taxes shall be imposed by the state on lands or property belonging to or which may hereafter be purchased by the United States or reserved for its use."

We are not impressed, however, that this provision of the Constitution has any bearing upon the question under consideration. No attempt is made to impose any tax upon the lands or other property of the Federal government, or upon the lands or property of the tribe.

In Cozier et al. v. McMillan County, 22 Mont. 484, it was held that the fact that an Indian post trader was licensed by the federal government to trade with the Indians upon an Indian reservation within the state of Montana did not exempt his stock and trade from county and state taxation; that such trader was a mere licensee, and not an agent of the government. The same rule is announced in Noble et al. v. Amoretti, 11 Wyo. 230.

In U. P. R. R. Co. v. Peniston, supra, it is said:

"It is, therefore, manifest that exemption of federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of the power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect."

We are not convinced that a tax upon the chattel real granted by the federal government to appellant, which pertains, it is true,

to real property belonging to the Indian tribe, is a tax upon
339 commerce with the Indian tribe. It appears to us to be rather a tax upon property that has been acquired by the lessee by reason of its negotiation and business transaction with the federal government. The tax attempted to be levied upon appellant's property in this proceeding is the same ad valorem tax that is levied upon all the property of the state. By it appellant's property, which enjoys the protection of the departments of the state, is made to bear its just share of the burden of the state government, and no more. It is not a tax upon appellant's operations; nor is it imposed upon the franchise or right of appellant to exist and perform the function for which it was brought into being. In fact, its corporate franchise or rights as a corporation are not derived from the federal government, but from the state of New Jersey, under whose laws it was incorporated and organized.

In Forbes v. Gracey, 94 U. S. 762, was involved the validity of a statute of Nevada that taxed all the ores, tailings, mineral-bearing material of whatever character, after deducting the actual cost of extracting said ores from the mine and other expenses, such as transporting them to the place of reduction. In other words, the tax was levied upon the ores or minerals after they had been separated from their bed in the land, and was not upon the ore or mineral in situ. But the statute made such tax "a lien on the mines or mining claims from which the ores or minerals bearing gold or silver are extracted for reduction." The tax involved in that case was upon ores and minerals extracted from the public lands of the United States, and it was attempted to enforce the tax lien against a mining claim of the person who owned the mining claim from which the ores and minerals taxed were extracted, and the tax was resisted upon the ground that the title to the land from which the ores were taken was in the United States, and that the ores, for that reason, were not taxable, and that the lien could not be enforced against the mining claim. The court, in sustaining the lien and the tax, among other things, said:

340 "The use of the word 'mines or mining claims' is evidently intended to distinguish between the cases in which the miner is the owner of the soil, and therefore has perfect title to the mine, and those in which the miner does not have title to the soil, but works the mine under what is well known in the mining districts, and what is, as we have said, recognized by the act of Congress, as a mining claim. In the first case, the statute makes the tax a lien on the mine, because the title to the mine is in the person who owes and should pay the tax. In the other, the tax is a lien only on the claim of the miner; that is, on his possessory right to explore and work the mine under the existing laws and regulations on the subject."

We are therefore constrained to the view that the tax sought to be levied is not invalid because sought to be levied upon a federal agency or upon a franchise granted by the federal government; or because it interferes with the power of Congress to regulate commerce between the Indian tribes.

Our decision is that the report of the referee should be confirmed, and the judgment of this court is that the property of appellant be assessed as recommended by the referee in his report.

Upon the last proposition discussed, the writer of this opinion is not without doubt as to the correctness of the conclusion reached thereon; but since appellant has a remedy to correct any error that may be committed in this decision upon this question by an appeal to the Supreme Court of the United States, and there is doubt whether the state would have any relief, should the doubt we entertain be resolved erroneously against the state; and since no statute should be declared void as being in conflict with the Constitution, unless such conflict is clear, we are influenced to resolve the doubt existing in our minds as to its validity in favor of the contention of the state.

341 Kane and Loofbourrow, J. J., concur; Turner, J., concurs, except in last proposition discussed.

WILLIAMS, *J.:*

I dissent from that part of the opinion which holds that the State Board of Equalization has power to assess such property of the appellant as is not necessary to or reasonably incidental to the carrying on of its public service business. It is my opinion that all such property should be assessed by the local or county officer or board, and not the State Board. With this exception, I concur in the opinion.

342 & 343 Filed Mar. 2, 1914. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

Number 3240.

In re Assessment of the Indian Territory Illuminating Oil Company.

*Petition for Rehearing.*

Brennan, Kane & McCoy, Attorneys for Indian Territory Illuminating Oil Company.

344 In the Supreme Court of the State of Oklahoma.

Number 3240.

In re Assessment of the Indian Territory Illuminating Oil Company.

*Petition for Rehearing.*

Comes now the Indian Territory Illuminating Oil Company, the appellant in the above and foregoing proceeding, and
345 moves the Honorable Supreme Court to grant it a rehearing of said cause on the following grounds:

I.

The Court, in its opinion, overlooked the fact that Harvey Coal and Coke Company v. Dillon, 59 W. V. 605, 6 L. R. A. (N. S.) 628, 53 S. E. 928, cited in its opinion in the above and foregoing case, and which, in a large measure, is the basis of the opinion of the Court in this cause, is based on a statute of West Virginia, Acts of 1905, Chapter 35, page 285, which, in direct and express terms, declare chattel reals to be subjects of taxation, and that prior to such decision, and prior to the passage of such act, the Supreme Court of West Virginia had held such leases and the rights secured or evidenced thereby were not the subject of taxation as shown in Carter v. Tyler County Court, 45 W. V. 806, 32 S. E. 216, cited in the briefs in this cause, and also overlooked the case of Barnes v. Been, 138 Fed. 476, and Rockwell v. Warren County, 77 Atl. 695, and other cases cited in briefs in this cause, holding that oil and gas mining leases could not be subject to taxation unless expressly authorized and provided by law.

346 II.

The Court overlooked the fact that in Graciosa Oil Company v. Santa Barbara County, 99 Pac. 483, cited by the Court in its opinion to support the conclusion therein arrived at, such opinion, in addition to being a construction and based on Sec. 3617 of the Code of California, which section is cited by this Court as being substantially the same in effect as Sec. 7544 of the Compiled Laws of 1909 of Oklahoma, was mainly based upon other provisions of the laws of California, to-wit:

Sec. 3820 of the Code of that state, which, in express terms provides that taxes on all assessments of possession of, claim to, or right to, the possession of the land, shall be immediately due and payable upon assessment, and shall be collected by the assessor as provided in the chapter on taxation, and Sec. 3821 which declares that in the cases provided for in Sec. 3820, the assessor shall, at the time of making the assessment, or at any time before the first Monday of August following, collect taxes by seizure and sale of any personal property owned by the person against whom the tax
347 is assessed, and if no personal property can be found, then such assessor shall collect the taxes by seizure and sale of the possession of, claim to, or right to the possession of the land, and that by Sec. 3822 of the Cole of California, the provisions of Sec. 3791 to 3796 of the Code of such state providing for the seizure and sale of property for taxation shall apply to the sale for taxes on assessments of possession of, claim to or right to, the possession of land, and that it was held by the Supreme Court of California in such case that the interests sought to be taxed or sold for taxes in the Graciosa case fell directly within the express terms of Sec. 3820 of the California Code. The Court also overlooked the fact that the case of Graciosa Oil Company itself holds that an oil and gas mining lease gives an interest or estate in land, and that, under the rule declared in Oklahoma by the opinion in this case, and in

Duff v. Keaton, Frank Oil Company v. Bellview Oil and Gas Company, and Kelachny v. Galbreath, an oil and gas mining lease has been expressly held not to give an interest in the oil or in and to the land described in such lease.

III.

348 The Court overlooked the fact that the case of Texas Co. v. Daugherty, et al., 160 S. W. 129, cited by this Court in support of its opinion, was by an inferior court of the State of Texas, from which there was a dissent by Chief Justice Conner, who is perhaps the ablest judge on that Court and that such opinion was in direct conflict with the decision of the Supreme Court of Texas in the case of the State of Texas v. A. and N. W. R. R. Company, 94 Texas 530, 62 S. W. 1050, and Thompson v. Daugherty, 71 Tex. 192, construing the same statute construed by the Civil Court of Appeals in the Texas case, and that a writ of error had been granted by the Supreme Court of Texas for the purpose of reviewing the decision of the Civil Court of Appeals in the Texas case, and also overlooked the fact that in the case of the State v. Downman, 134 S. W., 787, the Court of Civil Appeals of Texas, of another district or division of that state, expressly upheld the taxing of all deeds to mineral rights on solid minerals on the express ground that said deeds amounted to a severance of the mineral estate from the estate in the surface, and expressly stated that the deeds conveyed an interest in land, and if they conveyed an interest in the
349 land, and not a mere privilege or incorporeal right, the interest conveyed was the subject of taxation, and that a writ of error in State v. Downman has been denied. The denial of the writ of error in the Downman case is, therefore, an express approval of the doctrine declared in that case, that where deeds or leases create a severance of the mineral estate, the interest given by such instruments is the subject of taxation, and the granting of a writ of error in the Texas Co. case is, at least, an indication that the Supreme Court of Texas is of the opinion that an oil and gas mining lease which does not give an interest in the land or in the oil thereunder, and is a mere chattel real or incorporeal hereditament, is not the subject of taxation.

IV.

The Court overlooked the fact, in its opinion, that in the State of California, prior to the enactment of Sec. 3617, 3820, 3821, et sequens, cited in the Graciosa case, the Supreme Court of California, in De Witt v. Hayes, 2 Cal. 463, held that chattel reals and incorporeal rights were not the subject of taxation, although the constitution and laws of California provided that all property should be the subject of taxation.

350 V.

The Court, in its opinion, overlooked the fact that in oil and gas mining states, under statutes in effect declaring all property the

subject of taxation, such states had uniformly held that oil and gas mining leases were not the subject of taxation until after the passage of laws, in express terms, providing for the taxation of mining leases and rights or chattel reals, which cases have been cited in the briefs in this cause.

VI.

The Court overlooked, in its opinion herein, the contention made in behalf of the Indian Territory Illuminating Oil Company that Sections 7574, 7575, 7586, 7589, 7591 and 7706 of the Compiled Laws of Oklahoma, 1909, provided for the rendition of taxes of property engaged in the oil and gas mining business, including improvements on leases of every kind and character, and the levying of a production tax on the amount of oil produced from such leases evinced and showed an intention on the part of the legislature to tax oil and gas mining interests in the manner prescribed in such statutes to the exclusion of any other.

351

VII.

The Court, in its opinion, overlooked and did not consider that Sec. 7544 of the Compiled Laws of Oklahoma, 1909, had been in force since the beginning of territorial existence, and had never been construed by the taxing officers of the various counties, or the State Board of Equalization, as taxing chattel reals, and that this contemporaneous construction of the statute by the officers charged with its construction and enforcement, should be binding on the court, and followed in this cause.

VIII.

The Court overlooked, in its opinion, the fact that, in order for oil and gas mining leases to be taxed as real estate under Sec. 7544, such leases must, of necessity, create an interest in real estate, and amount to a severance of the mineral estate from the estate in the surface, and that this could not be so unless the Supreme Court is to overrule the doctrine on that subject declared in Kelachny v. Galbreath and other cases following that case.

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IX.

The Court fails to sufficiently consider the question of the non-taxability of the particular oil and gas mining rights sought to be taxed in this case, on the ground of interference with a Federal Agency, overlooking the fact that the mineral rights in the Osage Nation are, for the present at least, vested in the tribe, and that the tribe as a department of the Federal Government, in the control and management of the Osage Indian tribe, would themselves have the right to enter on the lands of the tribe, and extract oil therefrom and that neither the mineral right considered separately from the land, or as a part of the land, would be subject to state taxation, nor could the right of the tribe as a tribe, to extract the oil from

under the land be subject to state taxation. If the tribal authorities themselves could extract such oil from under the land without being subject to state taxation for so doing, certainly it would have a right to give another the power to do for it that which it could do for itself.

X.

353 The Court overlooked the fact, in its opinion, that an oil and gas mining lease on the lands of the Osage Tribe is in effect but a means or method by which the tribe extracts oil and gas by and with the service of another, which service is remunerated by giving such others a certain proportion of the oil and gas found, and retaining a certain portion in the tribe. In other words such a lease is a joint adventure, in which the lessee furnishes the capital with which to discover, develop and produce oil, which oil, if found, shall belong to such person in certain proportions, and to the Osage Tribe in certain proportions, and that a state tax thereon is, in effect, a tax on the right of the Indian Tribe to discover and produce oil and gas belonging to it from its tribal lands.

Wherefore, The Indian Territory Illuminating Oil Company prays that this Honorable Court will grant it a re-hearing in said cause, and give it sixty days from the filing of this petition in which to file briefs sustaining this petition.

XI.

354 The Court overlooked or failed to consider the real and essential nature of an oil and gas mining lease in this: The Court considers the oil and gas mining lease as if a complete sale and transfer of the right *of* privilege of mining pertaining to the land, when in truth and in fact it is but a joint venture entered into by the lessor and lessee whereby the lessor furnishes the land and the lessee the capital to exploit the land and operate on it, and each is to have the share of the product agreed upon. Under such contract the land owner is as much as ever the owner of the right and privilege. He merely shares with the lessee the profits of its use, if any, in consideration of the lessee furnishing the capital.

XII.

The Court has overlooked the fact that when land is assessed to the owner at its true value in accordance with section 7544 that such assessment includes the value of all rights and privileges belonging or appertaining thereto, and that when the land owner is so assessed and he pays the taxes on his land the mandate of the law that all property in the state shall be assessed and taxes paid thereon is fully complied with, as was decided in the cases of State v. A. & N. W. Railway Co., 94 Texas 530, and Thompson v. Daugherty, 71 Texas 192.

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## XIII.

The Court has overlooked the fact that section 7544 Compiled Laws 1909, was never designed or intended to segregate land into different estates or to point out specific items of property or separate estates in land as being subject to taxation, but was designed to declare and does declare what should be included in a rendition for taxes of real estate, that is, the different items that should be considered in arriving at the value to be fixed on the land as an entirety when such land was assessed, and the obvious construction and meaning of the section is, that when the owner of the land renders the same for taxation or it is assessed by the proper officer, all the different things mentioned in said section should be considered as going to make up the real estate and that each of these items shall be considered in placing a value on the land and the land as so valued assessed to the owner of the land. This is the rule declared in Texas under a statute which the court finds to be identical with section 7544, as shown by State v. Railway, 94 Texas 530.

## XIV.

356 The Court overlooked the fact that under the California Statute relied on as being substantially the same as section 7544 the bare or naked possession of land without any right thereto is to be deemed land for the purpose of taxation, and the method, time and manner of taxing and enforcing the taxes on such bare possession is prescribed by other sections of the California Code, and therefore this Court was in error in holding the Gracioso Oil Company v. Santa Barbara Co., as an authority bearing out the construction placed by the Court on section 7544, or as an authority holding oil and gas mining leases taxable as an interest or state inland under section 7544.

Wherefore, the Indian Territory Illuminating Oil Co. prays this Honorable Court to grant it a rehearing in said cause and give it sixty days from the filing of this petition in which to file briefs in support hereof, and further prays the Court that owing to the importance of this case to the State, to the Osage Tribe of Indians, and to the great body of oil producers it will depart from its usual rule and permit this petition to be orally argued and set it down for such argument before it is decided whether the rehearing will be granted or denied.

BRENNAN, KANE & McCOY,
*Attorneys for Indian Territory Illuminating Oil Company.*

357 And thereafter, to-wit, on March 24, 1914, there was made and entered the following order.

Supreme Court, January Term, 1914, March 24th, 1914, Twenty-ninth Judicial Day.

#3240.

In re Assessment of Property Ind. Ter. Ill. Oil Co., etc.

And now on this day it is ordered by the Court that appellants be allowed 30 days in which to file brief, and Attorney General is allowed 3 days thereafter in which to file reply brief.

It is further ordered by the Court that C. B. Ames, be allowed to file briefs amicus curiæ, in the above cause.

It is ordered by the Court that the above cause be set for oral argument on petition for rehearing on the first Tuesday after the briefs allowed to be filed herein are received by the Clerk of this Court.

Ind. Ter. Ill. Oil Co., In re Assessment.

3240.

And now on this 24th day of March, 1914, it is ordered by Hayes, C. J., that the mandate of this Court in the above cause be stayed pending disposition of petition for rehearing.

358 And thereafter, towit, on April 28, 1914, there was made and entered the following order.

Supreme Court, April Term, 1914, April 28th, 1914, Eighth Judicial Day.

#3240.

In re Assessment I. T. Ill. Oil Co., etc.

And now on this day the above cause is continued till April 29, 1914, and it is ordered by the Court that N. A. Gibson, and Geo. S. Ramsey, be allowed to file amicus curiæ briefs at this time.

359 And thereafter, towit, on April 29, 1914, there was made and entered the following order.

Supreme Court, April Term, 1914, April 29th, 1914, Ninth Judicial Day.

#3240.

In re Assessment of I. T. Ill. Oil Co.

And now on this day the above cause is argued orally and the cause is submitted on the record, briefs, oral argument and petition for rehearing.

360 And thereafter, towit: on June 9, 1914, there was made and entered the following order.

Supreme Court, April Term 1914, June 9th, 1914, Sixteenth Judicial Day.

#3240.

In re Assessment of the Indian Territory Ill. Oil Co.

And now this cause comes on for final decision and determination by the court on rehearing.

And the court having considered the same finds that the report of the referee in the above cause should be confirmed.

It is therefore ordered and adjudged by the Court that the report of the referee in the above cause, be, and the same is hereby confirmed. Opinion by Kane, C. J.

All the Justices concur.

361 In the Supreme Court of the State of Oklahoma.

(Filed Jun- 9, 1914. W. H. L. Campbell, Clerk.)

No. 3240.

In re Assessment of The Indian Territory Illuminating Oil Company.

1. The power to tax is legislative and there must be distinct authority of law for every levy upon the people under that power.

2. Property itself is a creature of law and the discretion to select subjects of taxation rests solely with the legislature.

3. Where the legislature has omitted to provide for the assessment of certain kinds of property, it is not within the province or power of the court to make such assessments. No property can be assessed until the legislature has made proper provision for this purpose.

4. The legislature of this State has not selected oil and gas leases, as such, as subjects of taxation.

5. The legislature has not provided for a severance of the various interests which may be held in real property for purposes of taxation.

6. By virtue of sections 7304 and 7307, Rev. Laws, 1910, "real property," which, for the purpose of taxation, means "the land itself, and all buildings, structures and improvements or other fixtures of whatsoever kind thereon, and all rights and privileges thereto belonging or in anywise appertaining, and all mines, minerals quarries and trees on or under the same," must be listed and assessed in the name of the owner of the land.

7. Oil and gas, while lying in the strata of earth from which they are produced, must be taxed as real property to the owner of the

land, if the land is taxable, under which for the time being they may lie.

8. Corporations incorporated under the laws of a sister state, doing business in this State, are taxable the same as domestic corporations.

9. A corporation for gain, incorporated under the laws of a sister state, doing business in this State, is not exempt from state taxation, either in its corporate person or its property, because the Federal Government finds it convenient or profitable to deal with it in carrying out its policy toward the Osage tribe of Indians.

10. It is a cardinal rule that whatever property is worth for the purposes of income and sale, it is also worth for the purpose of taxation.

11. Evidence examined and held, Sufficient to support the findings of the referee on the question of value.

(Syllabus by the Court.)

362 Appeal from the State Board of Equalization.

Hon. R. M. Campbell, Referee.

Affirmed.

Brennan, Kane & Michaelson and Hayes McCoy, for Petitioner.

Charles West, Attorney General and W. C. Reeves, Ass't Attorney General, for the State.

Preston C. West, Gilbert & Bond, Stuart, Cruce & Gilbert, Dillard & Blake, James B. Diggs, Henry McGraw, Amici Curiæ.

*On Rehearing.*

Opinion of the Court by KANE, *C. J.*:

This is an appeal from the action of the State Board of Equalization in assessing the property of the Indian Territory Illuminating Oil Company for purposes of taxation. The return made by the company showed the valuation of its physical property for the purposes of taxation to be $53,835.10. The State Board of Equalization found the value of its property for purposes of taxation to be $538,350.00. In this Court, the cause was referred to a referee with directions to make findings of fact and conclusions of law. The referee found in effect that the Indian Territory Illuminating Oil Company is a corporation, organized under and by virtue of the laws of the State of New Jersey, with a capital stock of $3,500,000.00; that on the 16th day of March, 1896, the Osage Nation of Indians in Oklahoma Territory, entered into a contract with one Edwin B. Foster, by the terms of which said Edwin B. Foster had a blanket lease upon the lands in Oklahoma Territory known as the Osage Indian Reservation, for the sole purpose of prospecting and

drilling wells and mining and producing petroleum and
363 natural gas only. That this lease covered a period of ten years from its date and was approved by the Secretary of the Interior. That subsequent to the above date, said lease was extended, as to 680,000 acres of said Reservation, for a period of ten years from the date of its original expiration, and by the terms of said extension, said lease will expire on the 16th day of March, 1916; that prior to the extension of said lease the same had been assigned to the Indian Territory Illuminating Oil Company; that the Oil Company has sub-leased to something more than one hundred persons and corporations most of the lands covered by said lease contract, as extended on March 3rd, 1905, and oil operations on said lands have been and are being conducted largely by such sub-lessees; that a small portion of the tract, the amount of which does not appear from the evidence, is operated by the parent company direct; that said company has been, and is primarily engaged in the business of oil production in the territory covered by said lease with the Osage Indians, and has conducted its operations in the gas business as an incident to the development of the oil territory and the production of oil; and, to some extent, as a matter of accommodation to the citizens of Bigheart and Avant, and other persons residing along its pipe lines. That all the property owned by said company is located in Osage and Washington counties, Oklahoma, and all its business operations are conducted in said state. That the total valuation of said company's stock on the first day of February, 1911, was $500,000.00.

After making several proper deductions from the above sum, the referee finds that the total valuation of the Indian Territory Illuminating Oil Company's property of every kind, located in Oklahoma, over and above the amount locally assessed, was $447,169.98 on February 1st, 1911; and concludes that said company is liable for taxation by the State of Oklahoma for the full value of its property; and that it is not exempt from taxation upon the theory that it is a federal agent, or that it holds a franchise from the Federal Government.

364 The exceptions to the report of the referee filed by the Oil Company raise the following questions: (1) Was the evidence taken before the referee sufficient to sustain his finding that the appellant is a public service corporation; (2) Whether section 21, article 10, Williams' Constitution makes it the duty of the State Board of Equalization to assess all the property of public service corporations, including property not used in the public service, as well as that used in the public service; (3) Whether the evidence taken before the referee is sufficient to sustain his finding as to the value of appellant's taxable property; (4) Whether an oil and gas mining lease which grants to the lessee the right and privilege to go upon the lands of another for the purpose of exploring for oil and gas and to produce oil and gas and transport the same from the leased premises in consideration of the payment as royalty to the lessor of a part of the oil and gas discovered and a stipulated price for each well producing oil and gas, is taxable; (5) To what

extent is the appellant entitled to exemption from taxation on account of being a federal agency.

In a former opinion it was held:

"(1) Evidence examined and held sufficient to sustain the finding of the referee that appellant is a public service corporation.

"(2) Section 21, Article 10, Williams' Constitution makes it the duty of the State Board of Equalization to 'assess all railroad and public service corporation property.' By the foregoing provision of the Constitution, it is made the duty of the State Board of Equalization to assess all the property of any public service corporation, including property not used in the public service, as well as that used in the public service.

"(3) By reason of the foregoing statutes and section 7547, Comp. Laws, 1909, which requires all property to be assessed in the name of the owner thereof, an oil and gas mining lease should be assessed as the property of, and in the name of, the owner of such lease, and not as the property of and in the name of the lessor.

"(4) A statute of the state which authorized and directs the levy of an ad valorem tax upon an oil and gas mining lease from the Osage Tribe of Indians, approved by the Secretary of the Interior and extended by an act of Congress upon lands of such tribe of Indians is not void upon the ground that the lessee or his grantee is a federal agent, or, upon the ground that such tax is a direct burden upon or interferes with the power of Congress to regulate commerce with the Indians tribes."

365 As the petition for rehearing filed herein does not seriously question the soundness of the first two holdings, we will assume that they are correct, and will proceed to examine the remaining propositions.

It is well settled that the power to tax is legislative and there must be distinct authority of law for every levy upon the people under that power. 1 Cooley on Taxation 546. Recognizing the general nature of the power, the Constitution of the State ordains, (sec. 2, art. 10, Williams' Const.), that "The legislature shall provide by law for an annual tax sufficient with other resources to pay the estimated ordinary expenses of the state for each year." And section 8 of the same chapter provides that, "All property which may be taxed ad valorem shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale;" and section 14 provides that, "Taxes shall be levied and collected by general laws and for public purposes only."

From the foregoing constitutional provisions and others of similar import, it is obvious that it is left to the legislature of the state to determine all questions of state necessity, discretion or policy involved in ordering taxation and to decide when, how and for what public purpose taxes shall be levied and collected and to select the subjects of taxation. 1 Cooley on Taxation 546; Thomas v. Gay, 169 U. S. 264.

Therefore, it becomes necessary to inquire what provision our legislature has made toward vitalizing the constitutional mandate. Section 7302, Rev. L. 1910, provides that, "All property in this

state, whether real or personal, including the property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation."

366 Property itself, being a creature of law, and the discretion to select subjects for taxation resting solely with the legislature, it may be expected of any law for the levying of taxes that it will specifically or otherwise enumerate the kinds of property to be taxed. This is essential since all property is never taxed and the assessor is without guide unless the statute supplies it. Lott v. Ross & Co., 38 Ala. 156; Moseley, etc. v. Tift, 4 Fla. 402; De Witt v. Hays, 2 Cal. 463. In this State sections 7304 and 7305, Rev. Laws, 1910, supply this essential requirement. The first of these sections provides that, "Real property for the purpose of taxation shall be construed to mean the land itself, and all buildings, structures and improvements or other fixtures of what-soever kind thereon, and all rights and privileges thereto belonging or in anywise appertaining, and all mines, minerals, quarries and trees on or under the same." And the second section provides that, "Personal property, for the purpose of taxation, shall be construed to include:

First. All goods, chattels moneys, credits and effects.

Second. All improvements made by others upon lands, the fee of which is still vested in the United States or this State; all improvements, including elevators and other structures, upon lands, the title to which is vested in any railway company or other corporation whose property is not subject to the same mode and rule of taxation as other property.

Third. The stock of nurserymen, growing or otherwise.

Fourth. The amount of money invested in bonds, stock or credits outside of the State of Oklahoma.

Fifth. All public stock and securities, and stocks or shares in any national or other bank or company incorporated under the laws of this or any other State, or of the United States, and situated and transacting business in this State.

Sixth. All shares in foreign corporations, owned by residents of this State.

Seventh. All horses and neat cattle, mules, asses, sheep, swine and goats.

Eighth. All household furniture, including gold and silver plate, musical instruments, watches and jewelry.

Ninth. Private libraries.

367 Tenth. All vehicles for transporting persons or passengers for pleasure or profit.

Eleventh. All wagons, vehicles or carriages and all improvements or machinery appertaining to agricultural labor.

Twelfth. All machinery and materials used by manufactories and all manufactured articles.

Thirteenth. Annuities, not including pensions from the United States or any state of the Union, until paid into the hands of the pensioner.

Fourteenth. All money, goods or property and capital employed in merchandizing.

Fifteenth. All agricultural implements or machinery, goods, wares, merchandise or other chattels, in this State, in possession of, or under the control of, or held for sale by any warehouseman, agent, factor or representative in any capacity of any manufacturer, or any dealer or agent of any such manufacturer.

Sixteenth. Personal property belonging to persons or companies doing freight or transportation business and belonging wholly or in part to persons within this State, for such part as is owned by said persons."

The significant features of the latter section for the purposes of this case are: The fifth subdivision thereof classifies stock or shares in any company incorporated under the laws of this or any other state as personal property for purposes of taxation; (2) Nowhere in this enumeration is a leasehold classified as personal property for purposes of taxation notwithstanding it is well settled that according to the general classification of property for other purposes a leasehold being a chattel real is personal property. Section 7319, Rev. Laws, 1910, which casts upon the State Board of Equalization the duty of providing "for the use of the assessors suitable notices and blank forms for the listing and assessment of all property and such instructions as shall be needful to secure full and uniform assessments and returns," provides that all taxable property shall be listed according to the classification therein prescribed which follows in effect the foregoing classification of property for purposes of taxation, and like it, also, this enumeration does not classify a leasehold as either real or personal property.

368 Section 7307, Rev. Laws, 1910, provides that "All taxable property, real or personal, shall be listed and assessed each year at its fair cash value, estimated at the price it would bring at a fair voluntary sale, in the name of the owner thereof on the first day of March of each year." And section 7338 provides that "every public service corporation organized, existing or doing business in this state shall on or before the last day of February of each year return sworn lists or schedules of its taxable property as hereinafter provided, or as may be required by the State Board of Equalization, and such property shall be listed with reference to the amount, kind and value on the first day of February of the year in which it is listed: and said property shall be subject to taxation for state, county, municipal, public school and other purposes, to the same extent as the real and personal property of private persons."

In the instant case we have a corporation for profit, incorporated under the laws of the State of New Jersey, transacting business in this State. There can be no doubt that foreign corporations doing business in another state are taxable in the latter state, the same as domestic corporations, if the terms of its statutes are such as to warrant it. People v. McLean, 80 N. Y. 254. There are no definite rules for arriving at the value of property for purposes of taxation unless the statute has prescribed them. Our statute contains a general direction that property must be assessed for taxation at its fair cash value estimated at the price it would bring at a fair voluntary sale; and the tribunal charged with the duty of estimating the value

of such property must do so according to its best judgment and with honest purpose. To state in detail the many particulars in the mass of circumstances laying the basis of a rational judgment touching the value of corporate property for purposes of taxation would serve no useful purpose. Generally, when the purpose of the law is to tax the corporation on the value of its property, this may be done either by assessing the capital stock as being presumptively
369 the actual measure of its property, or, by assessing the property specifically on an estimated value. Commonwealth v. N. Y., P. & O. Ry. Co., 188 Pa. St. 169; Railway Co. v. Bachus, 154 U. S. 421; Adams Exp. Co. v. Auditor, 166 U. S. 185, 41 L. Ed. 977; Henderson Bridge Co. v. Commonwealth, 99 Ky. 623, 166 U. S. 150; Oswego Starch Factory v. Dolloway, 21 N. Y. 499; State v. Jones, 51 Ohio St. 492; State v. Anderson, 90 Wis. 550.

There is no serious conflict in the evidence taken before the referee, and the question of value of the property involved must therefore turn upon the deductions which reasonably may be drawn therefrom, in the light of the well established general rules governing such matters.

Briefly, the evidence shows that the company is capitalized at $3,500,000.00; that whilst it was incorporated under the laws of the State of New Jersey, its business is confined entirely to the State of Oklahoma. The referee found that all the property owned by said company and used in the conduct of its business is located in Osage and Washington counties, Oklahoma, and all its business is conducted in said State. There is evidence to the effect that the business of the company pays one per cent on its entire capital stock. This evidence, of course, would not justify the referee in finding that the par value of the stock or shares of the company was presumptively the value of its property for the purpose of taxation. But when we consider that according to the report of the referee, less than one-seventh of its capital is invested in this State, and that the business done in the state pays one per cent or more on its entire capital stock, we are not prepared to say that the finding of the referee is not supported by sufficient evidence. Whilst the business of the company in Oklahoma may pay only one per cent on its entire capital stock, it pays more than seven per cent on the part thereof invested within this State, which is in our judgment a very fair return upon the investment. It is a cardinal rule which should never be forgotten that whatever property is worth for the purposes of income and sale, it is also worth for the purposes of taxation. Adams Exp. Co. v. Auditor, supra.

370 The appellants complain that the referee unduly considered the oil and gas lease hereinbefore mentioned in reaching his conclusion as to the value of appellant's property. Whilst we are not convinced that this is so, we are satisfied that there is sufficient other evidence in the record to support the finding of the referee as to the value of the company's property.

The provisions of the Statute already adverted to provide a complete system for the levying of all taxes upon an ad valorem basis; and we can find no warrant in any of them for levying an ad valorem tax upon an oil and gas lease as such. Generally, an oil and gas

lease, a school land lease or a lease of any sort, for that matter, undoubtedly is property. But, as we have hereinbefore stated, property itself is a creature of the law and the classification thereof for purposes of taxation belongs exclusively to the legislative department. The legislature in classifying property for purposes of taxation is not required, and does not, always follow the common law classification of property for other purposes. It will frequently be found that the enumeration of property in statutes as real or personal for the purpose of taxation differs considerably from what it would be for other purposes in the same state. Steere v. Walling, 7 R. I. 317.

To determine that a certain article is property, according to the common law or general classification, is not to determine whether it is taxable; to be taxable it must be selected as a subject of taxation according to the legislative classification for that purpose. Therefore, the general rule is, no property can be assessed until the legislature has made proper provision for this purpose; and where the legislature has omitted to provide for the assessment of certain kinds of property, it is not within the province or power of the court to make such assessment. Willis, Ex'r. v. Commonwealth, 97 Va. 667; In Re. Taxation Patented Min. Lands, 9 Colo. 622; People v. Feitner, 167 N. Y. 1; Wisconsin Ry. Co. v. Taylor Co., 52 Wis. 37; Daugherty v. Thompson, 71 Tex. 192; Trammell v. Faught, 12 S. W. 317; De Witt v. Hays, 2 Cal. 463, 56 Am. Dec. 352;
371 Carter v. Tyler Co. Ct., 43 L. R. A. 725; Williams v. Triche, 107 La. Ann. 93, 31 So. 926. It is also observable that in many jurisdictions various interests in real property for purposes of taxation are made severable and assessable in the names of the owners of the respective interests. That, however, is not the case in this State. Under our system of taxation, real property which for purposes of taxation means the "land itself, all buildings, stocks, improvements, or other fixtures of whatsoever kind thereon and all rights and privileges thereto belonging or in anywise appertaining, and all mines, minerals, quarries or trees under or on the same", must be assessed in the name of the owner of the land. This is in consonance with the general rule which seems to be that where the law does not provide for a severance for purposes of taxation and the lease is silent upon the subject, the obligation to pay taxes upon the leased premises devolves upon the lessor. Freeman v. State, 115 Ala. 208; People v. Barker, 153 N. Y. 111; East Tennessee etc. R. Co. v. Morristown, 35 S. W. 771. However, the lessee's assumption of the payment of taxes and assessments does not relieve the lessor from his liability nor does it enable the taxing authority to secure a personal judgment against the lessee. 1 Desty on Taxation 436; Yazoo & M. V. R. Co. v. Adams, 76 Miss. 545; Miles v. Delaware & H. Canal Co., 140 Pa. St. 623; C. R. I. & P. Ry. Co. v. Ottumwa, 112 Ia. 300.

But the fact that the legislature has omitted to provide specifically for the assessment of any particular kind of property does not furnish ground for assuming that the legislature has illy followed the constitutional mandate that all property shall be taxed at its fair cash value. For example, article 14, chapter 72, Rev. Laws, 1910, provides for the taxation of railroads upon a gross revenue basis. Yet, it will not be contended that this system does not constitute a

tax upon the value of the property and franchises of the railroads situated within the state. The same may be said of the case at bar.

The law specifically provides for the taxation of the "stock or
372 shares" of corporations as personal property upon an ad valorem basis, and it has been held that for the purpose of taxation, the word, "stock" in a statute authorizing taxation of the stock of corporations means not only stock subscriptions, but the actual tangible property of the corporation. M. C. R. Co. v. Porter, 17 Ind. 380; State v. Branin, 23 N. J. L. 484. And this is not all. In addition to the taxes levied upon an ad valorem basis, article 13, chapter 72, supra, provides for a gross revenue tax upon every person, firm, association or corporation, engaged in the mining or production in this state of petroleum or other mineral oil, or of natural gas, equal to one-half of one per cent of the gross receipt from the total production of petroleum or other mineral oil or natural gas.

We, therefore, conclude that oil and gas, while lying in the strata of Mother Earth, from which they are produced, constitute a sort of subterranean fœra naturer which, if taxed at all, prior to being reduced to possession must be taxed as real property to the owner of the land under which for the time being they may lie and cannot be taxed against one who has a mere lease or license to go upon the premises, search for and, if found, take them away. Frank Oil Co. v. Belleview Gas & Oil Co., 29 Okla. 719; Kolachny v. Galbreath 26 Okla. 772; Carter v. Tyler Co. Court (W. Va.), 32 S. E. 216; Kansas Natural Gas Co. v. Bd. of Com'rs of Neosho Co. (Kan.), 89 Pac. 750; Peterson v. Hall (W. Va.), 50 S. E. 603; Barnes v. Bee, 138 Fed. 476; Hughes v. Vail, 57 Vt. 41; State v. South Penn Oil Co., 24 S. E. 638.

It seems to us that this is the most scientific method for imposing taxation upon this class of property. To undertake to tax an oil or gas lease is to undertake to impose a tax upon the illimitable vista of hope. Many instances are known where lessees have paid thousands of dollars bonus for a lease and have not discovered a drop of oil; and many other instances are known where the leases have cost comparatively nothing and oil has been found in
373 enormous quantities. Whether oil is under any particular tract of land is beyond the ken of man until a well has been drilled, and even then, no one can foresee how long the well will last or what its production will be. A great many people speculate in these oil and gas privileges; a few get rich, while others fail. Under the system of taxation devised by the legislature the wealth produced by the oil industry, the production of oil, the capital invested in its production, the oil on hand and the oil in place are taxed. We can find no justification in the law for any additional exactions.

Primarily this company is not a federal agency. It is a corporation for profit, incorporated under the laws of the state of New Jersey, and doing business in the State of Oklahoma, with whom the Federal Government finds it convenient or profitable to deal in carrying out its policy toward the Osage Tribe of Indians. What the state is attempting to do is to tax the property of this corpora-

tion within its borders. This certainly is a proper exercise of the taxing power of the state. In re Assessment W. U. Tel. Co., 35 Okla. 626. Borrowing the language of Mr. Justice Holmes, in Baltimore Shipbuilding Co. v. Baltimore, 195 U. S. 375, "It seems to us extravagant to say that an independent private corporation for gain, created by a state, is exempt from state taxation, either in its corporate person, or its property, because it is employed by the United States, even if the work for which it is employed is important and takes much of its time."

As the authorities sustaining this view of the case are collected in McAlester-Edwards Coal Co. v. Trapp, recently handed down, but not yet officially reported, it will be sufficient to refer to that case as controlling on this phase of the case at bar.

The report of the referee is therefore confirmed.

All the Justices concur.

374 In the Supreme Court of the State of Oklahoma.

No. 3240.

In re Assessment of Indian Territory Illuminating Oil Company.

*Petition for Rehearing.*

To the Honorable Supreme Court of the State of Oklahoma:

Now comes the State of Oklahoma, by the Attorney General, and moves and prays this Honorable Court to grant it a rehearing of this cause and to modify its opinion of June 9, 1914, as follows:

First. To reverse and modify said opinion so as to hold that oil and gas leases are liable to and may be assessed for all purposes of taxation in the names of and against the lessees as a right or privilege appertaining to the land and belonging to the lessees, and severed from the ownership of the fee.

Second. If this Honorable Court should hold that oil and gas leases are not taxable as such in the names of the lessees, except in the instances where such leases are owned by corporations and enter into and form a part of the estimate of the value of the capital stock, surplus and undivided profits of such corporations, the State asks that it be decided by this Court whether such leases for the purposes aforesaid shall be assessed in the counties, townships and school districts where the property covered by such
375 leases is situated, or at the principal place of business of such corporations.

The State bases its claim for such reversal upon the contention that the Court erred in holding, as in paragraph 4 of its syllabus, that "the Legislature of this State has not selected oil and gas leases, as such, as subjects of taxation," and in paragraph 5 of said syllabus, in which the Court holds that "the Legislature has not provided for severance of the various interests which may be held in real property for purposes of taxation," and in paragraph 6 of said sylla-

bus, holding "that all rights and privileges belonging to or in anywise appertaining to said lands, and all mines, minerals, quarries and trees on or under the same, must be listed and assessed in the name of the "owner of the land."

The Court has overlooked the decision of the Supreme Court of the United States, in the case of the State of Texas vs. Downman, reported in the Advance Sheets U. S. Supreme Court, January 1, 1914, in which it was held that one man may own the fee in land and another may own the mineral right, and that the fee and the mineral right are separately taxable, and has overlooked and disregarded the case of The Texas Company vs. Daugherty, et al., 160 S. W. 129, and the case of Graciosa Oil Company vs. Santa Barbara County, 99 Pac. 483, in which the courts of last resort in Texas and California have construed statutes of those states similar to the Oklahoma statute holding that gas leases similar to the one under consideration are taxable to the owners thereof, which cases were called to the attention of this Court in the briefs of counsel for the
376 State upon the original hearing and argument of this cause.

And the State asks that this petition be set down for hearing and oral argument allowed in addition to briefs in support of the same; that the same be set down at as early a date as the Court may give, for the reason that the final determination of the questions herein involved materially affects the revenues of the State at large, and particularly of the counties and local sub-divisions in which such leased lands are situate, as affecting the place where such property is taxable, if at all, and affecting the rates of taxes to be fixed by the Excise Board, which must be levied for meeting the purposes of state, county and local government.

CHAS. WEST,
*Attorney General;*
CHAS. L. MOORE,
*Assistant Attorney General,*
*Of Counsel for the State.*

STATE OF OKLAHOMA,
*Oklahoma County, ss:*

Mabel Fasken, of lawful age, being first duly sworn, deposes and says that she is an employee in the office of the Attorney General of the State of Oklahoma, that she served a copy of the within Petition for Re-hearing, on Brennan, Kane & Michaelson, Bartlesville, by mailing a full, true, correct and complete copy thereof to the address of Brennan, Kane & Michaelson, at Bartlesville, Oklahoma, on this the 15th day of June, A. D. 1914.

MABEL FASKEN.

Subscribed and sworn to before me on this the 15th day of June, 1914.

[SEAL.] N. E. DE MOSS,
*Notary Public.*

My commission Expires Oct. 25, 1915.

16—283

OSE IN CENTER

Endorsed: No. 3240. In the Supreme Court of the State of Oklahoma. In re Assessment Indian Territory Illuminating Oil Co. Petition for re-hearing. Filed Jun- 15, 1914. W. H. L. Campbell, Clerk. Leave to file granted. 6/16/14. Kane, C. J. Chas. West, Attorney General. Chas. L. Moore, Ass't Att'y Gen.

377 Filed Jun- 19, 1914. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

#3240.

In re Assessment of Indian Territory Illuminating Oil Company.

Now comes Indian Territory Illuminating Oil Company and moves to be allowed to file with the clerk of said court its motion for a re-hearing in the above entitled cause, which said motion is hereto annexed and made a part of this motion.

BRENNAN, KANE & McCOY.
*Attorneys Indian Territory Illuminating Oil Company.*

Service of the Application and motion herein, are hereby acknowledged by the receipt of a copy of same, this June 19, 1914.

CHAS. L. MOORE.
*Ass't Att'y Gen.*

378 In the Supreme Court of the State of Oklahoma.

#3240.

In re Assessment of the Indian Territory Illuminating Oil Company.

*Petition for Rehearing.*

To the Honorable Supreme Court of Oklahoma:

Now comes the Indian Territory Illuminating Oil Company, by its attorneys, Brennan, Kane & McCoy, and prays this Honorable Court to grant it a re-hearing of this cause, and to modify its opinion of June 9, 1914, as follows:—

(1) To reverse and modify said opinion so as to hold that said company is not taxable on the value of its oil leases in the Osage Reservation, held under its lease from the Osage Tribe of Indians.

(2) To reverse and modify said opinion so as to absolve said company from the payment of taxes on its oil leases to the same extent as all individuals and lessees in Oklahoma are exempted by the said opinion of June 9, 1914, and to reverse the Conclusions of Law of the Honorable Referee herein.

(3) The court overlooked the fact that the Honorable Referee

found in his additional findings of fact that the total actual
379 value of all the gas lines and similar property in its gas business was $53,835.10, and that the gas business and oil business in the offices of said company are kept entirely separate, are easily accessible and easily ascertainable; and the court has overlooked the fact that the Referee actually found that the oil leases of the company were worth $393,334.88 out of the total value of $447,169.98; that there were only three species of property that *was* considered or ascertained in the whole evidence and that these three consist of (1) the gas pipeline business; (2) of the physical properties returned to the local assessor and (3) the balance was the receipts of the company from oil.

The Referee found that the receipts of the company from oil in 1910 were $118,687.49. The Referee found that the gas business was conducted at a loss.

(4) This Honorable Court overlooked the fact that the only property that this company had was the so-called Foster Oil & Gas Lease in the Osage Reservation, from the Osage Tribe of Indians, and that it had no property in other states and conducts no other business whatsoever. That all its stock was invested in this state, in said Reservation, under said lease. That the manner in which Three Million (3,000,000) shares of stock happened to be issued in the first place was fully disclosed in the evidence and not denied. (See page 101 of the printed record.)

This Honorable Court has overlooked the fact that it was plainly testified to that the estimate of $500,000.00 embraced all the oil
380 leases of the company, and that the two other species of property were particularly itemized.

(5) This Honorable Court erred when it decided in its opinion that the Referee found that the total value of the company's stock was $500,000.00, because, in reality, the Referee included in his finding the total value of all the property of the company, tangible and intangible, and in his first conclusion of law found as follows:

"The Indian Territory Illuminating Oil Company is liable for taxation by the State of Oklahoma for the full value of its property, tangible and intangible.—that is, for the sum of $500,000.00."

(6) That the first decision of this court in this case correctly recites such conclusions of the Referee as follows, viz.:

"The Referee found the total value of all the property of the company, including its tangible and intangible property, on the first day of February, 1911, to be $500,000.00."

The word "stock" in the findings of fact is used inadvertently and is specifically cleared up in the conclusions of law. The value of the stock of the company was only inquired into for the purpose of ascertaining the value of this oil company's properties, which were exactly the same as all oil companies' properties, viz: oil leases, physical properties, including derricks, etc., etc., and gas pipe lines. The physical properties were exactly determined by the Referee at $52,-32.50. The gas pipe lines were determined at $53,835.10. The balance was the value of its oil leases. It was admitted that the

company had no other property of any kind or nature and operated in no other state and that its sole business was confined to performing the conditions as lessee under the Foster Oil & Gas Mining Lease in the Osage Reservation.

381

(7) There is no law of this state which permits the assessing of the value of the capital stock of a corporation to the corporation itself. The statute quoted by the court permitted the assessment of capital stock in corporations to the individuals owners thereof, and not to the corporation. If the value of the stock in a corporation, and the total income paid out thereon, may be considered for any purpose, it is only incidental to the ascertainment of the value of the properties owned by such corporation. The three specific properties in this case were clearly shown by the evidence, and it was a matter of no dispute before the Board of Equalization, before the Referee and on the first hearing in this case that nearly $400,000.00 of said value embraced the value of the company's lease in the Osage Reservation aside from its physical properties and its gas properties. The evidence before the State Board of Equalization was made a part of the evidence before the Referee.

(8) This Honorable Court has overlooked the fact that on the hearing of this case we seriously questioned the correctness of the findings in the former opinion to the effect that this company was a public service corporation, and that it could be assessed by the State Board of Equalization.

(9) That the effect of the said decision of this court is to compel this company to pay on a valuation of its oil leases while the other oil companies of the state, and individuals particularly, are exempted therefrom, and that this company is particularly entitled to the protection of Section 1 of Article 14 of the Constitution of the United States by denying to the Indian Territory Illuminating Oil Company, within its jurisdiction, the equal protection of the law.

382

(10) This company again reiterates that its business is of such a federal nature as to entitle it to protection from taxation on its lease from the Osage Tribe of Indians, under Section 8 of Article 1 of the Constitution of the United States, which grants to Congress alone the power to regulate commerce among the several states and with the Indian Tribes.

(11) That this Honorable Court has overlooked the evidence in this case that the income of this company is derived solely from the oil lease operated by this company and granted to it, as lessee, by the Osage Tribe of Indians and the Congress of the United States, and that the Referee actually sustained several requests for findings offered by this company, in which he found the valuation of the different properties and the income from the oil in such way as to clearly demonstrate this fact. (See additional findings of fact by the referee.)

(12) That there is no specific statute or law in Oklahoma that permits the taxation of income from oil leases, except the Gross Production tax, which is paid by the defendant company, and is not embraced in these proceedings, and that this company operates and

conducts its business exactly the same as any other oil company, and that careful lists of each kind of property were submitted, together with the exact source of the company's income, and that even
383 as to corporations doing business in Oklahoma, the effect of said decision would be to hold this company for the year in question and absolve all the rest engaged in identically the same business.

And the Indian Territory Illuminating Oil Company asks that this petition be set down for hearing and oral argument allowed in addition to briefs in support of the same: that the same be set down at as early a date as the court may give.

BRENNAN, KANE & McCOY,
*Attorneys for Indian Territory Illuminating Oil Company.*

Pls. file, 6/19/14.
K., *C. J.*

384 Supreme Court, July Term, 1914, September 8th, 1914.
Fourteenth Judicial Day.

3240.

In re IND. TER. ILL. OIL CO.

And now on this day it is ordered by the Court that the petition for rehearing filed herein be, and the same is hereby overruled.

385 I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, hereby certify that the foregoing pages numbered from 1 to 384 inclusive are a full, true and complete transcript of the record and all proceedings in said Supreme Court in the case entitled, In re Assessment of Property of Indian Territory Illuminating Oil Company, as the same remain on file and of record in this Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Supreme Court, at the City of Oklahoma City, this 2d day of November, A. D. 1914.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL, *Clerk.*
By JESSIE PARDOE, *Deputy.*

Endorsed on cover: File No. 24,438. Oklahoma Supreme Court. Term No. 283. Indian Territory Illuminating Oil Company, plaintiff in error, vs. The State of Oklahoma. Filed November 13th, 1914. File No. 24,438.

FILED
FEB 1 1916
JAMES D. MAHER
CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

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## No. 283.

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INDIAN TERRITORY ILLUMINATING OIL COMPANY, PLAINTIFF IN ERROR,

vs.

STATE OF OKLAHOMA.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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## BRIEF FOR PLAINTIFF IN ERROR.

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JOHN H. BRENNAN,
PRESTON C. WEST,
*Attorneys for Plaintiff in Error.*

## SUBJECT INDEX.



### TABLE OF CASES.

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

## No. 283.

INDIAN TERRITORY ILLUMINATING OIL COMPANY, PLAINTIFF IN ERROR,

*vs.*

STATE OF OKLAHOMA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

## BRIEF FOR PLAINTIFF IN ERROR.

### Statement of Case.

The writ of error in this case brings before this court for review the final judgment of the Supreme Court of the State of Oklahoma, wherein and whereby said State court affirmed the decision of its Referee herein, which in turn had affirmed the findings of the State Board of Equalization, assessing the Indian Territory Illuminating Oil Company on its stock, property, tangible and intangible, at $500,000. There were two opinions: the original March 2, 1914 (Record, p. 211), and one on motion for rehearing,

June 9, 1914 (Record, p. 232). (See 142 Pac., 997.) The appeal from the determination of the State Board of Equalization to the Supreme Court of Oklahoma was under and by virtue of chapter 87, Laws of 1910 of that State, which permitted persons and corporations aggrieved by the action of said board to appeal to the Supreme Court of said State, where the cause must be tried *de novo*. The Oklahoma court referred the cause to a referee in the case to report findings of fact and his conclusions of law thereon.

The plaintiff in error claims that it was a Federal agent, acting under Federal appointment and authorization in the development of lands belonging to the Osage Tribe of Indians in the Osage Reservation, and that its business, license or permit as such cannot be taxed by the State government, although its physical properties are always subject to taxation. It contends that the United States Government had a definite duty in respect to opening and operating the oil mines upon the lands of the Osage tribe, and plaintiff in error is the instrumentality through which this obligation is being carried into effect. Plaintiff in error claims the protection of several clauses in the Federal Constitution, hereinafter referred to, and claims that the last decision of the State court in this case, if allowed to stand, would of itself raise the question as to whether plaintiff in error had not been therein denied the equal protection of the laws, as the judgment herein places the plaintiff in error in a category by itself as to the taxation of oil and gas lands, separate and distinct from any other similar company in Oklahoma.

There was some evidence taken before the State Board of Equalization (Record, pp. 17-69, inc.). After some voluminous procedure, petitions, notices of appeal, etc., as appears in the record regularly, there was additional evidence taken before the Referee, which may be found in the record from

pages 77 to 95, inclusive. Thereafter a bill of exceptions was settled and the evidence is repeated. Therefore it may be very pardonable in this brief to make a statement of the facts and various points in the record, so as to clarify the atmosphere, not only for the benefit of the court, but for the benefit of the Attorney General of Oklahoma, who has come into office since this record was made.

The lease holdings of the plaintiff in error were originally granted in 1896 to Edwin B. Foster and assigns, and covered the whole of the Osage Reservation, about 1,500,000 acres. The lease was to run ten years, and gave the grantee extensive privileges to prospect for, produce, and market both oil and gas. It was executed by virtue of act of Congress, February 28, 1891 (26 Stat., 794-5), which reads as follows:

> "*Provided*, That where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by the authority of the council speaking for such Indians, for a period not to exceed five years for grazing, or ten years for mining purposes in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior."

The lease expressly ran to the grantee and his assignees and recognized the right in said grantee to sublease any portion thereof.

It further appears that the Indian Territory Illuminating Oil Company actually did sublease 680,000 acres out of the whole reservation prior to December 31, 1904, and that numerous firms, individuals, associations, and subcompanies were in actual possession, as such sublessees, in December 1904, and January, 1905, operating under the Parent Lease. The ten-year limitation on the original lease would expire in March, 1906; so that for the full protection of the extensive property involved, the Congress of the United

States itself, by act of March 3, 1905 (33 Stat., 1049, 1061), extended said lease to the extent only of such portion as had been subleased, viz., 680,000 acres, as follows:

> "That any allotments which may be made of the Osage reservation, in Oklahoma Territory, shall be made subject to the terms and conditions of the lease herein authorized, the same being a renewal as to a part of the premises covered by a certain lease dated March 16, 1896, given by the Osage Nation of Indians to Edwin B. Foster, and approved by the Secretary of the Interior and now owned by the Indian Territory Illuminating Oil Company under assignments approved by the Secretary of the Interior, which said lease and all subleases thereof duly executed on or before December 31, 1904, or executed after that date based upon contracts made prior thereto, and which have been or shall be approved by the Secretary of the Interior, to the extent of 680,000 acres in the aggregate, are hereby extended for a period of ten years from the 16th day of March, 1906, with all the conditions of said original lease, except that from and after the 16th day of March, 1906, the royalty to be paid on gas shall be one hundred dollars per annum on each gas well, instead of fifty dollars as now provided in said lease, and except that the President of the United States shall determine the amount of royalty to be paid for oil. Said determination shall be evidenced by filing with the Secretary of the Interior on or before December 31, 1905, such determination; and the Secretary of the Interior shall immediately mail to the Indian Territory Illuminating Oil Company and each sublessee a copy thereof."

All the said subleases were separately approved, making a binding, separate contractual relation between each sublessee and the United States Government, acting for the Osage Indian tribe. All of the 680,000 acres is subleased except several thousand acres operated by the parent company itself. All are operating under the rules and regulations of the Department of the Interior (Record, pp. 47-53, inc.). No

sublease could be made or be valid without the approval of the Secretary of the Interior; all such approvals being, of course, pursuant to the departmental rules and regulations. And in this connection, the attention of the court is respectfully called to the recognition of this plaintiff in error as *"an intermediary"* even since this case reached this court, which matter is hereafter in this brief further referred to.

The subleases made by the plaintiff in error and referred to in the evidence are for oil only. The parent company reserves all the gas. This policy conserved the gas fuel in one company, and that company dealt the same out, at a nominal figure or price, to the oil sublessees, so as to induce development of wild-cat wells and untried acreage. The gas pipe lines were laid on the surface of the ground for the primary purpose of furnishing the producer of oil with fuel. The plaintiff in error had a reserved interest in each sublease of one-sixth royalty to itself, paying one-eighth to the tribe under the original lease and the act of renewal. Therefore such gas as was reserved from each sublease was furnished back to the producers at a loss to the parent company, as far as the gas business is concerned (Rec., pp. 23, 25, 26, 27, 35). The plaintiff in error was interested in all the leases to the extent of the gas reserved, the royalty to the tribe, and the general development to satisfy the conditions of the original lease.

In addition to all this the parent company may itself drill on subleased property and retain the well if gas (but, if oil, it belongs to the sublessee) (Record, p. 94).

So we find an intricate intertwinement of relation between the Indian Territory Illuminating Oil Company and its sublessees extending to the entire acreage. The Referee found that in prosecuting this business, in the development of the Osage Reservation, the plaintiff in error had lost in its gas operations, except as such gas business may have been profitable as an adjunct to the company's oil business (seventeenth finding, Record, p. 81).

The company received an oil royalty of about $95,000

from such joint operations and about $23,000 from leases operated by it—gross (Record, p. 103). Its expenses deducted, allowed the usual one per cent, or $35,000, in dividends for the year from the whole property.

The original lease is found at pages 77 to 78, inclusive. It is in the usual form for prospecting and mining for oil and gas; the grantee to pay a royalty of one-tenth of all the crude petroleum mined or procured from said land as the same is delivered free in tanks at the wells or place where produced, and $50 per annum for each gas well that may be discovered and utilized, said royalty to be based upon the market value of the products produced at the place of production and to be paid to the National Treasurer of the Osage Nation for the use and benefit of the Osage tribe of Indians. This royalty to the tribe was raised by the President to one-eighth under the delegated power in the act of March 3, 1905.

At the hearing before the State Board of Equalization, the plaintiff in error duly preserved all the questions with reference to its character as a Federal agency (Record, pp. 44, 45, 46). In the notice of appeal it again preserved all of said questions, and pointed out to the court its immunity from taxation of such character (Record, pp. 3-13, inc.). *The valuation of all physical properties was admitted and not denied.* The jurisdiction of the Board in the first instance and the Supreme Court thereafter to assess that portion of the property of the plaintiff in error known as oil and gas leases under the act of Congress referred to was the only question in the case. No testimony was introduced by the State. Before the Referee it was testified to and admitted *that the company had no other property than this very lease of the Osage Reservation* (Record, p. 87). Its capital stock was represented by this lease. The manner in which the $3,500,000 of stock came to be issued was stated in full and admitted, viz., that certain promoters were responsible for that deal and that through litigation the property was taken back by the old owners

and that they took over the stock rather than an assignment of the property (Record, p. 90).

The only testimony as to the value of all the property of the corporation, which included only the Osage lease and its equipment, was given by witnesses for plaintiff in error. The testimony showed it to be worth $500,000, but that this figure covered the whole property, including all the oil production and oil properties. It included the lease itself, stock in the company, and the good will and franchise of the company. It included the right to do business in the Osage Reservation, as it is being conducted now. In another form it would mean the transfer of the stock of the company with the governmental consent and acquiescence (Record, p. 91).

This was the evidence on which the Referee might base his finding of fact numbered fourteen, that "the total value of said company's stock, including all its property, tangible and intangible, on the first day of February, 1911, was $500,000" (Record, p. 80). It is the basis of the Referee's conclusions of law as follows:

> "The Indian Territory Illuminating Oil Company is liable for taxation by the State of Oklahoma, for the full value of its property, tangible and intangible—that is, for the sum of $500,000.00" (Record, p. 81).

The findings of fact and conclusions of law by the Referee appointed by the Supreme Court of Oklahoma were confirmed (Record, p. 210). As the Referee's findings were amended by him prior to submission to the Supreme Court (Record, p. 104), and in order that this court may understand the issue, as well as for the benefit of counsel, who did not try this case in the court below, it would be proper here to emphasize said findings of fact and conclusions of law with the amendments. We quote from the Referee's report:

To the Honorable Supreme Court of the State of Oklahoma:

The cause above entitled is an appeal from the assessment made by the State Board of Equalization of the State of Oklahoma, of the taxable property of the Indian Territory Illuminating Oil Company, for the year 1911.

By order of the court duly entered I was appointed referee, and was directed as such to report my findings of fact and conclusions of law to the court. This appointment was made in January, 1912, and after taking the oath of office I heard the evidence offered by the Indian Territory Illuminating Oil Company, in the month of March, 1912, at which time said Indian Territory Illuminating Oil Company and the State of Oklahoma appeared before me by their respective attorneys. The time allowed by the original order in which the report of the Referee should have been filed has been extended by the court, and I now beg leave, in accordance with the order of appointment, to submit the following findings of fact and conclusions of law as arrived at by me after a consideration of the evidence and of the transcript of the proceedings had before the State Board of Equalization. Before said Board certain evidence was offered and certain statements were made and certain documents were filed by the Indian Territory Illuminating Oil Company, and these have all been considered by me, together with such additional documents, statements, and arguments of counsel as the respective parties to the litigation have seen fit to offer (Record, pp. 77-78).

*Findings of Fact.*

From the evidence I find the following facts:

1. The Indian Territory Illuminating Oil Company is a corporation organized under and by virtue of the laws of the State of New Jersey with a capital stock of $3,500,000.00.

2. On the 16th day of March, 1896, the Osage Nation of Indians in Oklahoma Territory entered

into a contract with one Edwin B. Foster, by the terms of which said Edwin B. Foster had a blanket lease upon the lands in Oklahoma Territory, known as the Osage Indian Reservation, for the sole purpose of prospecting and drilling wells and mining and producing petroleum and natural gas only. This lease covered a period of ten years from its date and was approved by the Secretary of Interior. Under an act dated March 3, 1905, this lease was extended as to 680,000 acres of said reservation for a period of ten years from the date of its original expiration, and by the terms of said extension said lease will expire on the 16th day of March, 1916. Prior to the act of March 3, 1905, by which said lease was extended, the same had been acquired by and assigned to the Indian Territory Illuminating Oil Company.

3. The Indian Territory Illuminating Oil Company has subleased to something more than one hundred persons and corporations most of the lands covered by said lease contract as extended on March 3, 1905, and oil operations on said lands have been and are being conducted largely by such sublessees.

4. A small portion of the tract, the amount of which does not appear from the evidence, is operated by the parent company direct.

5. By the terms of the lease contract with the Osage tribe of Indians, as extended by act of March 3, 1905, the sublessees are required to pay a royalty of one-sixth of the oil produced upon the property covered by the lease, of which amount one twenty-fourth goes to the parent company and three twenty-fourths, or one-eighth, to the Osage Indians, the payments on behalf of the Indians being made to the United States Indian Agency for the Osages, at Pawhuska, Oklahoma, under and by virtue of certain rules and regulations governing the leasing of said lands, promulgated by the Department of the Interior.

6. The Indian Territory Illuminating Oil Company has laid pipe lines upon and across the land covered by said lease, for conveying natural gas, and during the period of its operations it has been the

practice of said company to furnish natural gas to the sublessees for use as fuel in their drilling and pumping operations at a flat rate, the amount of which is not disclosed by the evidence.

7. The Indian Territory Illuminating Oil Company, during the year 1911, and prior thereto, furnished natural gas for domestic consumption to the citizens and residents of the towns of Bigheart and Avant, two small towns located in the Osage Nation adjacent to the pipe lines of said Company. It was also, during said year and prior thereto, furnishing some gas to a local corporation in the city of Bartlesville, which held a franchise for and was engaged in the business of selling gas to the residents and citizens of that city, and the same was true at the town of Ochelata, where the local distributing company was furnished certain quantities of gas for use in its business in selling gas to the inhabitants of that place.

8. The Indian Territory Illuminating Oil Company had no local franchises at either Bigheart or Avant for the distribution of gas, and was not engaged in the distribution and sale of gas to the citizens and residents of the other places mentioned.

9. By the terms of its contract with the Osage Indians the Indian Territory Illuminating Oil Company was required to furnish gas free to the Osage citizens, and for use in the public institutions of the Osages, under certain conditions named.

10. Said Company has been and is primarily engaged in the business of oil production in the territory covered by said lease with the Osage Indians, and has conducted its operations in the gas business as an incident to the development of the oil territory and the production of oil, and to some extent, as a matter of accommodation, to the citizens of Bigheart and Avant, and other persons residing along its pipe lines.

11. Said Comapny made a sworn return to the State Board of Equalization for the year 1911, of $53,835.10, as the actual fair cash value of that part of its property engaged in the public service, by reason of the gas business transacted by the company. This valuation was raised by the State Board of Equaliza-

tion to $538,350, by action of the Board on the 30th day of August, 1911.

12. Said Company returned its property to the local assessors of Osage and Washington counties, for the year 1911, at $52,830.02, at which the same was assessed.

13. All the property owned by said Company and used in the conduct of its business is located in Osage and Washington counties, Oklahoma, and all its business operations are conducted in said State.

14. The total value of said Company's stock, including all its property, tangible and intangible, on the first day of February, 1911, was $500,000.

15. The amounts returned by said Company to the local assessors of Osage and Washington counties, and to the State Board of Equalization, do not include the lease, subleases, contracts and franchises of the Company, but only its physical properties, such as pipes, pipe lines and accessories, furniture, cash, accounts and bills receivable, it being contended by said Company that its lease, sublease, contracts and franchises are not subject to taxation by the State of Oklahoma.

16. The total value of the Indian Territory Illuminating Oil Company's property of every kind located in Oklahoma, over and above the amount locally assessed, was $447,169.98, on February 1, 1911.

17. The gas business, as heretofore conducted by said Comapny, has not been, of itself, profitable, but it has been and is valuable as an adjunct to the Company's oil operations (Record, pp. 77, 78, 79, and 81, inc.).

*Additional Findings of Fact.*

* * * * * * *

15. Considered as a business and going concern, the Bigheart plant was and is worth $7,000, and the Avant plant was and is worth not more than $2,500.

16. Said Company has no substantial, large pipe line that will accommodate any large quantity of gas for any great distance.

17. That the total actual value of all the gas pipe lines and similar physical property in said gas business is $53,835.10.

18. The gas business and the oil business in the office of said Company is kept entirely separate, is easily accessible and easily ascertainable.

19. That the Company showed its receipts and disbursements from the sale of gas in such business separate from oil for several years prior to the time of the hearing before the Board and down to May 31, 1911.

28. That the Indian Territory Illuminating Oil Company received a royalty from oil alone from all its sublessees, being the one-twenty-fourth part, in 1910, to the value of $98,802.22.

That it operated some oil leases directly itself for oil and received:

| | |
|---|---|
| From lot # 32 | 21,362.13 |
| From lot #293 | 1,916.34 |
| From lot #275 | 606.80 |
| | 23,885.27 |

| | |
|---|---|
| So that its total income from oil alone for the year 1910 was | 122,687.49 |
| And the expense of such oil production was | 36,593.19 |

30. That said Company has paid all taxes under the revenue law of the State of Oklahoma the same as other oil and gas companies, as is customary throughout the gas and oil country, and has returned its physical properties in the oil business to the local assessor and has paid its production tax from time to time.

32. That the said Indian Territory Illuminating Oil Company is now and has been at all times operating under said lease through said Act of Congress and under the Rules and Regulations of the Department of the Interior, introduced in evidence in this case, wherein and whereby said Department supervises the conduct of the business in the field with said Indian tribe and the said Department of the Interior has its inspectors and other officers in charge (Record, pp. 101-104).

The above request for special findings of fact pre-

sented to me this 10th day of October, 1912. Said findings numbered 15, 16, 17, 18, 19, 28, 30 and 32, respectively are allowed by me and made part of my report in said cause as findings of fact, and the State of Oklahoma is allowed an exception.

R. M. CAMPBELL, *Referee.*

(Record, pp. 101, 103, and 104.)

*Conclusions of Law.*

I beg leave to report the following conclusions of law in this case, based upon the findings of fact as above set forth.

1. The Indian Territory Illuminating Oil Company is liable for taxation by the State of Oklahoma, for the full value of its property, tangible and intangible—that is, for the sum of $500,000.

2. I conclude that the Indian Territory Illuminating Oil Company is not exempt from taxation upon the theory that it is a Federal agent or that it holds a franchise from the Federal Government, but that the Act of Congress under which the contract with the Osage Indians was authorized and extended to the 16th day of March, 1916, was not entered into for the purpose of using said Indian Territory Illuminating Oil Company, as a Federal agent, or in the discharge of any governmental duty or function. In my opinion, the Act of Congress did not enlarge in any way, or in any way affect the powers of the Indian Territory Illuminating Oil Company, to make a contract. It was free to do that at any time, but this Act of Congress simply made the Osage tribe of Indians eligible to enter into a contract on their part. The purpose of the Government was to see to it that said tribe of Indians was fairly dealt with and properly treated. They were allowed, with the supervision, and subject to the approval, of the Government, to make the contract themselves. It was their contract, not the Government's.

3. Said Company in the transaction of its business in Oklahoma, is a public service corporation on account of the nature of the gas business transacted by it, and by submitting its report to the State Board

of Equalization as a public service corporation, and admitting to that Board its liability to be assessed for taxation, by said Board, is estopped to deny that it is engaged in the public service.

4. That part of the property of said Company is used in the production of oil and in the oil business, is not engaged in the public service, but the two kinds of business transacted by said Company, one dealing with oil and the other with gas, are so closely intermingled that it is impossible to say just what part of the total valuation of the Company should be assessed by the State Board of Equalization as engaged in the public service and what part should be assessed by the local assessors of the counties in which the property of the Company is located.

5. It is immaterial so far as the amount of taxes that must be paid is concerned, or the manner of the payment of the taxes, or the time in which said taxes must be paid, whether the assessment of said Company is made by the State Board of Equalization or by the County Boards of the counties in which its property is located.

6. Said County Boards of Assessors, upon the report of said Company having assessed its property in those counties connected with the oil business, at $52,830.02, and that assessment having become final, it is fair and just that the remaining property of the Company should be assessed at the sum of $447,169.98, said sum being the difference between the total valuation of the Company's property and the amount returned to the local assessors of Osage and Washington Counties.

I recommend that a judgment be entered fixing the assessment upon the Indian Territory Illuminating Oil Company's property, for taxation for the year 1911, at said sum of $447,169.98.

* * * * * * *

R. M. CAMPBELL, *Referee.*

(Record, pp. 81-82.)

Therefore, it appears from the findings of fact and conclusions of law, with amendments, so endorsed and confirmed by the Supreme Court of Oklahoma upon uncontroverted

evidence, that the total value of the property of the company was $500,000, *which included all its property, tangible or intangible;* that the total value of its physical gas properties was $53,835.10; that the total value of its physical properties involved in the oil business and returned to the local assessors was $52,830.02; that the total valuation of all the physical properties of the plaintiff in error was $106,665.12; that the company is primarily engaged in the business of oil production in the territory covered by said lease, and that all the property owned by said company and used in connection with its business is located in Osage and Washington counties, Oklahoma.

**Issues Before the Supreme Court of Oklahoma.**

The State Board of Equalization is empowered, under the constitution of Oklahoma, to assess public service corporations only, and it appears that the gas properties of the plaintiff in error had been, for some years prior to 1912, assessed by said Board as public service. At the hearing in this case it was finally determined by the Board to include all the oil properties of the company. It was strenuously contended that the company was not a public service corporation as to its oil properties in the Osage Reservation which comprised the greater part of its activities and business. This issue was again pressed in the Supreme Court, and determined against the plaintiff in error, with the dissenting opinion of Williams, J., on this particular question (Record, p. 224).

It was plainly apparent that the Referee had assessed all the oil and gas leases in the Osage Reservation, in addition to the physical properties of the plaintiff in error, and this proposition pending before the Supreme Court of Oklahoma excited the activity and interest of attorneys representing the large oil and gas interests in the State of Oklahoma, who contended that such leases were not taxable under the stat-

utes of the State of Oklahoma, entirely aside from the federal question involved with reference to the Indian Territory Illuminating Oil Company. Many counsel appeared, *amici curiæ*, in the case and filed briefs. In the first opinion of the Supreme Court of Oklahoma the court determined that all oil and gas leases in the State of Oklahoma were subject to taxation under the special statutes of said State. (See subdivisions 3, 4, and 5 of syllabus, Record, p. 211.) As to the particular contention of the plaintiff in error the court, in its first opinion, determined that the plaintiff in error, as to said lease in the Osage Reservation, was not a federal agent within the purview of the decisions on that subject (Record, pp. 220, 221, 222, 223, and 224).

The court said that the proposition "involved the most difficult question presented in the case," and it further said:

> "We are therefore constrained to the view that the tax sought to be levied is not invalid because sought to be levied upon a federal agency or upon a franchise granted by the federal government; or because it interferes with the power of Congress to regulate commerce between the Indian tribes.
>
> "Our decision is that the report of the referee should be confirmed, and the judgment of this court is that the property of appellant be assessed as recommended by the referee in his report.
>
> "Upon the last proposition discussed, the writer of this opinion is not without doubt as to the correctness of the conclusion reached thereon; but since appellant has a remedy to correct any error that may be committed in this decision upon the question by an appeal to the Supreme Court of the United States, and there is doubt whether the State would have any relief should the doubt we entertain be resolved erroneously against the State; and since no statute should be declared void as being in conflict with the Constitution, unless such conflict is clear, we are influenced to resolve the doubt existing in our minds as to its validity in favor of the contention of the State" (Record, pp. 223, 224).

As the opinion of the Supreme Court involved the taxation of all the leases for oil and gas in the State of Oklahoma, in addition to the physical properties, it created some consternation, and motion for a rehearing was made and elaborate briefs filed (Record, pp. 225, 226, 227, 228, 229).

The Supreme Court of Oklahoma reviewed this former opinion, and after reversing all that part thereof in which it had been held that oil and gas leases were taxable, in substance held that the legislature had omitted to provide for the assessment of oil and gas leases; that it was not within the province or power of the court to make such assessment, and that the legislature had not selected oil and gas leases, as such, as subjects of taxation (Record, p. 231).

As to the plaintiff in error, whose leases had been clearly assessed in this case (or otherwise there would be no question of assessment of leases before the court), the court held that it was not exempt from State taxation, because the Federal Government found it convenient or profitable to deal with it in carrying out its policy toward the Osage tribe of Indians (Record, p. 232). *The reason why the honorable State court did not exempt the plaintiff in error from taxation of its leases, when it exempted all the other oil and gas leases in the State is not very clear*, and therefore we quote that portion of the second opinion, as follows:

> "In the instant case we have a corporation for profit, incorporated under the laws of the State of New Jersey, transacting business in this State. There can be no doubt that foreign corporations doing business in another State are taxable in the latter State, the same as domestic corporations, if the terms of its statutes are such as to warrant it. People *vs.* McLean, 80 N. Y., 254. There are no definite rules for arriving at the value of property for purposes of taxation unless the statute has prescribed them. Our statute contains a general direction that property must be assessed for taxation at its fair cash value estimated at the price it would bring at a fair voluntary sale; and the tribunal charged with the

duty of estimating the value of such property must do so according to its best judgment and with honest purpose. To state in detail the many particulars in the mass of circumstances laying the basis of a rational judgment touching the value of corporate property for purposes of taxation would serve no useful purpose. Generally, when the purpose of the law is to tax the corporation on the value of its property, this may be done either by assessing the capital stock as being presumptively the actual measure of its property, or, by assessing the property specifically on an estimated value. Commonwealth *vs.* N. Y., P. & O. Ry. Co., 188 Pa. St., 169; Railway Co. *vs.* Bachus, 154 U. S., 421; Adams Exp. Co. *vs.* Auditor, 166 U. S., 185; 41 L. Ed., 977; Henderson Bridge Co. *vs.* Commonwealth, 99 Ky., 623; 166 U. S., 150; Oswego Starch Factory *vs.* Dolloway, 21 N. Y., 499; State *vs.* Jones, 51 Ohio St., 492; State *vs.* Anderson, 90 Wis., 550.

"There is no serious conflict in the evidence taken before the referee, and the question of value of the property involved must therefore turn upon the deductions which reasonably may be drawn therefrom, in the light of the well-established general rules governing such matters.

"Briefly, the evidence shows that the company is capitalized at $3,500,000.00; that whilst it was incorporated under the laws of the State of New Jersey, its business is confined entirely to the State of Oklahoma. The referee found that all the property owned by said company and used in the conduct of its business is located in Osage and Washington counties, Oklahoma, and all its business is conducted in said State. There is evidence to the effect that the business of the company pays one per cent on its entire capital stock. This evidence, of course, would not justify the referee in finding that the par value of the stock or shares of the company was presumptively the value of its property for the purpose of taxation. But when we consider that according to the report of the referee, less than one-seventh of its capital is invested in this State, and the business done in the State pays one per cent or more on its entire capital stock, we are not prepared

to say that the finding of the referee is not supported by sufficient evidence. Whilst the business of the company in Oklahoma may pay only one per cent on its entire capital stock, it pays more than seven per cent on the part thereof invested within this State, which is in our judgment a very fair return upon the investment. It is a cardinal rule which should never be forgotten that whatever property is worth for the purposes of income and sale, it is also worth for the purposes of taxation. Adams Exp. Co. *vs.* Auditor, *supra.*

"The appellants complain that the referee unduly considered the oil and gas lease hereinbefore mentioned in reaching his conclusion as to the value of appellant's property. Whilst we are not convinced that this is so, we are satisfied that there is sufficient other evidence in the record to support the finding of the referee as to the value of the company's property." * * * (Record, pp. 236-238).

"Primarily this company is not a Federal agency. It is a corporation for profit, incorporated under the laws of the State of New Jersey, and doing business in the State of Oklahoma, with whom the Federal Government finds it convenient or profitable to deal in carrying out its policy toward the Osage tribe of Indians. What the State is attempting to do is to tax the property of this corporation within its borders. This certainly is a proper exercise of the taxing power of the State. *In re* Assessment W. U. Tel. Co., 35 Okla., 626. Borrowing the language of Mr. Justice Holmes, in Baltimore Shipbuilding Co. *vs.* Baltimore, 195 U. S., 375, 'It seems to us extravagant to say that an independent private corporation for gain, created by a State, is exempt from State taxation, either in its corporate person, or its property, because it is employed by the United States, even if the work for which it is employed is important and takes much of its time.'

"As the authorities sustaining this view of the case are collected in McAlester-Edwards Coal Co. *vs.* Trapp, recently handed down, but not yet officially reported, it will be sufficient to refer to that case as controlling on this phase of the case at bar" (Record, pp. 239-240).

## ASSIGNMENT OF ERRORS.

First. The Supreme Court of the State of Oklahoma erred in holding and deciding in its first opinion that a statute of the State which authorizes and directs the levy of an *ad valorem* tax upon an oil and gas mining lease from the Osage tribe of Indians, approved by the Secretary of the Interior and extended by an act of Congress upon lands of such tribe of Indians, is not void upon the ground that the lessee or his grantee is a Federal agent or upon the ground that such tax is a direct burden upon or interference with the power of Congress to regulate commerce with the Indian tribes.

Second. The Supreme Court of the State of Oklahoma erred in holding and deciding that the Indian Territory Illuminating Oil Company was not a Federal agency as follows in its opinion:

"Primarily this company is not a Federal agency. It is a corporation for profit, incorporated under the laws of the State of New Jersey, and doing business in the State of Oklahoma, with whom the Federal Government finds it convenient or profitable to deal in carrying out its policy toward the Osage tribe of Indians. What the State is attempting to do is to tax property of this corporation within its borders. This certainly is a proper exercise of the taxing power of the State. Borrowing the language of Mr. Justice Holmes, in *Baltimore Shipbuilding Company vs. Baltimore*, 195 U. S., 375, 'it seems to us extravagant to say that an independent private corporation for gain, created by a State, is exempt from State taxation, either in its corporate person, or its property, because it is employed by the United States, even if the work for which it is employed is important and takes much of its time.'"

Third. The Supreme Court of the State of Oklahoma erred in holding and deciding that the action of the State board of assessors in assessing the lease, rights, and privileges granted to the Indian Territory Illuminating Oil Company by the Osage tribe of Indians, and renewed by act of Congress, was

not in violation of section 1 of article 14 of the Constitution of the United States as depriving it of its property without due process of law.

Fourth. The Supreme Court of the State of Oklahoma erred in holding and deciding that the said action of the State Board of Equalization of the State of Oklahoma did not deprive the Indian Territory Illuminating Oil Company of the equal protection of the law contrary to the provisions of section 1 of article 14 of the Constitution of the United States.

Fifth. The Supreme Court of Oklahoma erred in holding and deciding that the action of the State board of assessors in so assessing the said privileges, business, and license of the Indian Territory Illuminating Oil Company did not impose an illegal burden upon said Company, and upon commerce with an Indian tribe contrary to the provisions of section 8 of article 1 of the Constitution of the United States.

Sixth. The Supreme Court of the State of Oklahoma erred in holding and deciding that the Indian Territory Illuminating Oil Company was lawfully taxed by the State Board of Equalization, notwithstanding a similar tax could not be imposed upon all other like companies in Oklahoma, nor individuals, or upon their oil and gas lease holdings, and thereby, in the opinion itself, separate from any other consideration, depriving the Indian Territory Illuminating Oil Company of the equal protection of the law contrary to the provisions of section 1 of article 14 of the Constitution of the United States.

Seventh. That if, in any view of the opinion of the court, the said court upheld said assessment of the State Board of Equalization as being an assessment against the capital stock of said Indian Territory Illuminating Oil Company, then, and in that case, the said court erred in so holding and deciding, because there was no proof that said Company had any stock assessable, and capital stock is not assessable to other companies under the laws of the said State of Oklahoma, and that thereby the said State of Oklahoma denies to the Indian Territory Illuminating Oil Company the equal protection of the

laws contrary to the provisions of section 1 of article 14 of the Constitution of the United States, and that in any event said decision of said court is error, because said capital stock embraces the value of the very lease held not to be taxable by the Supreme Court in said decision.

Eighth. The Supreme Court of the State of Oklahoma erred in denying the motion of said Company for a rehearing and modification of the court's opinion of June 9, 1914, wherein and whereby the attention of said court was called to the fact, as a basis for the petition, that the said decision of said court in effect compelled this Company to pay on the valuation of its oil leases, while the other oil companies and individuals in particular were exempted therefrom, contrary to section 1 of article 14 of the Constitution of the United States, and thus, by the effect of said opinion, denied said Indian Territory Illuminating Oil Company the equal protection of the laws in the State of Oklahoma.

## ARGUMENT.

**The whole assessment is void because of the inclusion therein of the business, franchises, grants, and leases belonging to plaintiff in error and granted by an act of Congress in a matter within its exclusive jurisdiction.**

The first, second, and fifth assignments of error may be considered together, as they involve the authority of the State of Oklahoma, the State Board of Equalization, or the courts of said State to impose burdens in the way of taxation on the business, license, or duties of the plaintiff in error in and under the lease contract granted by act of Congress, March 3, 1905, and which act, in terms, extended the oil and gas mining lease of the plaintiff in error to the 16th day of March, 1916.

It appears (Record, pp. 4, 5, and 6) that the lease was granted in 1896 over the whole reservation, 1,500,000 acres; that the lands embraced were then unexplored, but that by 1905, sufficient development had been obtained to warrant an extension by Congress over 680,000 acres. It appears that natural gas was discovered by the company in the course of its explorations for oil, but that such gas was used as fuel by the parent company in securing drilling by itself and sublessees. Surface gas lines were laid and extended in every direction by the parent company in order to carry out the main objects and conditions of the lease. The gas operations were conducted for drilling and development purposes, and, as far as such business was itself concerned, as a separate entity, it was so carried on at a loss of $50,000 in five years (Record, pp. 23, 24).

It appears that this gas property was considered by the State Board of Equalization as charged with a public service character, and, therefore, subject to assessment under the constitution of the State of Oklahoma, as a public service.

Prior to 1912 the oil properties and oil leases of the plaintiff in error were not involved in the assessment before the Board. Such oil properties and leases comprised 95 per cent of the total business of the Company at that time. The value of the physical properties, lines, etc., involved in the natural-gas business was testified to and returned at $53,835.10, and the Referee so found by admitting and allowing the seventeenth proposed finding of plaintiff in error (Record, p. 101). The total value of the physical properties involved in the oil business was admitted to be $52,830.02, and so found by the Referee (Record, p. 80). There was no conflict in the testimony and no witnesses produced by the State. The value of $500,000 placed upon all the property of the plaintiff in error was found by the Referee from the evidence of Mr. Brennan before the Board (Record, p. 27) and the evidence before the Referee (Record, p. 91), and it was particularly stated without dispute that it included the whole property, all the oil production and oil properties; it included the leases, stock in the company, and the good will and franchises of the company, and included the right to do business in the Osage Reservation, as it is now being conducted.

All the property of the Company is located in said Reservation, under said lease, with a short pipe line for gas running into Washington County. The Company had no property in any other State (Record, pp. 26 and 87). *The stock of the Company represented nothing but the property, viz., this lease of the Osage Reservation granted by the act of Congress.* No money was paid in for said stock. It conclusively appeared without dispute that as far back as 1902 this lease and property were in the hands of promoters, and that they formed the present company and issued said stock when litigation was commenced and the stock was all taken over by the old owners and held intact, in place of the property, and not put upon the market. This was fully described (Record, p. 90).

The Company itself was operating *three of four thousand acres* (Record, p. 85), and from these leases it received an income from the oil of about $24,000 in 1910 gross. (See 26th proposed finding of fact allowed by Referee, Record, p. 103.) The Referee found that "the Indian Territory Illuminating Oil Company is now and has been at all times operating under said lease through said act of Congress, and under the rules and regulations of the Department of the Interior, introduced in evidence in this case, wherein and whereby said Department supervises the conduct of the business in the field with said Indian tribe, and the said Department of the Interior has its inspectors and other officers in charge" (Record, p. 104; see plaintiff's 32d proposed finding allowed by Referee).

The total valuation of all the physical properties of the company was $106,665.12, *which left $394,665.12 as the valuation of the franchise and leases of the plaintiff in error as found by the Referee and the Supreme Court and admitted by the witnesses.* That is to say, substantially four-fifths of the total valuation embraced the intangible assets of the plaintiff in error, and, as found by the Referee in his first conclusion of law, the Indian Territory Illuminating Oil Company is liable for taxation by the State of Oklahoma for the full value of its property, tangible and intangible, that is, upon the sum of $500,000.

The lease as operated by the Company and its sublessees is a contractual relation by and between the said Company and its sublessees on the one hand and the Osage tribe of Indians and the United States Government on the other hand. It concerns tribal property wholly, and does not concern or affect the individual allotments or property of individual Indians. The sublessees referred to in the evidence were those who existed prior to December 31, 1905, and whose aggregate leases totaled 680,000 acres. The evidence did not refer to any subleases created by the parent company subsequent to the congressional act of March 3, 1905.

This act refers to 680,000 acres having been subleased, or contracted to be subleased, and said subleases were renewed by said act for a period of ten (10) years from March 16, 1906.

The act of March 3, 1905, which renewed said lease for ten years from March 16, 1906, did not refer the matter to the tribe or ask the consent of the tribe. The original act, under which the original lease was granted, provided that leases could only be made by the tribe for a period of ten years. The act of renewal gave a new lease for ten years more, arbitrarily, and without the consent of the Indians in the slightest degree, and arbitrarily changed some of the terms of said lease.

This is a stronger position than is involved in a lease by an allottee in the Five Civilized Tribes made subject to approval by the Secretary of the Interior. Yet even in such case it is held that in substance and effect it is the Secretary's lease. *Anicker* v. *Gunsberg*, 226 Fed., 179. Here the governmental act was primary and direct. The law did not permit the Osages, with the supervision of the Government, to make a contract for themselves, as is stated by the Referee. On the contrary, the Government made the contract itself by passing the act of Congress disposing of a subject within the exclusive jurisdiction of the Congress.

There is other congressional legislation on the subject. We introduced in evidence the Osage allotment bill, known as the act of June 28, 1906 (34 Stats., 539), which allots the land in the Osage Reservation to the Indians, with reservation of all the oil and gas and royalties thereon to the tribe (Record, p. 95). This act is instructive in showing that Congress has taken absolute possession of the mineral rights and the royalties produced under the lease in this case.

Subdivision 7 of section 2 provides as follows:

> "*And provided further*, That nothing herein shall authorize the sale of the oil, gas, coal, or other minerals covered by said lands, said minerals being reserved to the use of the tribe for a period of twenty-five years, and the royalty to be paid to said tribe as

hereinafter provided: *And provided further*, That the oil, gas, coal, and other minerals upon said allotted lands shall become the property of the individual owners of said land at the expiration of said twenty-five years, unless otherwise provided for by act of Congress."

Section 3 of said allotment bill further provides as follows:

"That the oil, gas, coal, and other minerals covered by the lands for the selection and division of which provision is herein made are hereby reserved to the Osage tribe for a period of twenty-five years from and after the eighth day of April, nineteen hundred and six; and leases for all oil, gas, and other minerals, covered by selections and division of land herein provided for, may be made by the Osage tribe of Indians through its tribal council, and with the approval of the Secretary of the Interior, and under such rules and regulations as he may prescribe: *Provided*, That the royalties to be paid to the Osage tribe under any mineral lease so made shall be determined by the President of the United States: *And provided further*, That no mining of or prospecting for any of said mineral or minerals shall be permitted on the homestead selections herein provided for without the written consent of the Secretary of the Interior: *Provided, however*, That nothing herein contained shall be construed as affecting any valid existing lease or contract."

It will appear from this provision that the Osage tribe of Indians have no power at all in the premises, because the leases are to be made "under such rules and regulations as the Secretary may prescribe." The royalties are to be determined by the President of the United States. Then the act proceeds to dispose of the royalties accruing under the lease to plaintiff in error. In the original lease the royalties were to be paid to the treasurer of the Osage tribe of Indians, but in this act the Government provided that the receipts and

royalties should be paid to the Treasurer of the United States, as follows:

> "That the royalty received from oil, gas, coal, and other mineral leases upon the lands for which selection and division are herein provided, and all moneys received from the sale of town lots, together with the buildings thereon, and all moneys received from the sale of the three reservations of one hundred and sixty acres each heretofore reserved for dwelling purposes, and all moneys received from grazing lands, shall be placed in the Treasury of the United States to the credit of the members of the Osage tribe of Indians as other moneys of said tribe are to be deposited under the provisions of this act, and the same shall be distributed to the individual members of said Osage tribe according to the roll provided for herein, in the manner and at the same time that payments are made of interest on other moneys held in trust for the Osages by the United States, except as herein provided."

Thereupon Congress provides in the act for further disposition of royalties from oil and gas for the support of the schools and other purposes in subdivision 3 of section 4. Congress further diverts said funds in subdivision 4 of section 4 by providing for $30,000 per annum received from oil and gas leases to be set aside for agency purposes.

When this act was passed the only lease in the Reservation was the lease to the Indian Territory Illuminating Oil Company, and the only royalties paid were paid by said Company. The only royalties now being paid are paid by said Company. The allotment bill, therefore, applies to the royalties accruing under this lease. It appears from said allotment bill that Congress has followed up and extended its authority expressed in the act of March 3, 1905 (33 Stats., 1049, 1061), by passing such enactments as it pleased with reference to any income derived by the Indian tribe under and by virtue of said original lease.

Therefore, by the two acts of March 3, 1905, and the allot-

ment bill, Congress expressed the exclusiveness of its authority to deal with this business of mining for oil and gas in the Osage Reservation. Plaintiff in error is an instrument or means by which Congress is continuing in the discharge of its duty as trustee and guardian for said tribe of Indians and their property.

We have already pointed out that since the inception of this litigation and since the record in this case was actually lodged in this court, the Osages themselves and the authorized representative of the Government have reaffirmed the fact that the plaintiff in error was an instrumentality of the Government in handling the oil situation in the Osage Nation. In June, 1915, the tribal council of the Osage Nation came to Washington and (the Secretary of the Interior then having under consideration the matter of leasing their lands after the blanket lease should by its own terms cease to be operative) passed a set of resolutions which were approved by the Secretary, and which contained, *inter alia*, the following:

> "Whereas the so-called Foster lease now owned by the Indian Territory Illuminating Oil Company and its sublessees, covering 680,000 acres in the Osage reservation, Oklahoma, will expire on the 16th day of March, 1916;
>
> "Now, therefore, be it resolved by the Osage Tribal Council now in session at Washington, D. C., this 17th day of June, 1915, that the following recommendations be, and are hereby, made to the Secretary of the Interior in connection with the leasing of said lands:
>
> * * * * * * *
>
> "3. The Indian Territory Illuminating Oil Company shall be eliminated as an intermediary."

This being after the fact would not, of course, be effective to fix authoritatively the status which plaintiff in error had occupied under its lease and the previous acts of Congress, but it clearly reflects the understanding of all parties that

for nearly twenty years this Company had acted as an "intermediary," and that it was recognized as being an agency or instrumentality theretofore employed by the Federal Government in handling the property and affairs of the tribe.

The plenary power of Congress over all the lands and property of the Osage Indian tribe will be admitted. Congress has unquestionably the power to administer the property of Indians, and Congress possesses a paramount power over their property by reason of the exercise of guardianship over their interests. Such authority may be implied, even though opposed to the strict letter of a treaty with the Indians.

*Lone Wolf* v. *Hitchcock*, 197 U. S., 553.
*Choctaw Nation* v. *United States*, 119 U. S., 1.
*Stevens* v. *Cherokee Nation*, 174 U. S., 445.
*United States* v. *Aaron*, 183 Fed., 347.
*United States v. Allen* (C. C. A.), 179 Fed., 13.
*Tiger* v. *Western Investment Company*, 221 U. S., 286.
*Anicker* v. *Gunsburg*, 226 Fed., 176.

In *U. S.* v. *Aaron*, *supra*, the Federal court had before it for the first time this very Osage allotment bill, and the court held that notwithstanding the origin of the title of the Osage tribe of Indians and its fee simple character, the ownership of the Osage Reservation was in the tribe, and not in individual members; and that it was competent for Congress to provide for its allotment to individual members and to impose such conditions and restrictions as it deemed proper.

In the case of *United States* v. *Board of County Commissioners*, 193 Fed., 485, Judge Cotteral again considered the general rules applicable to the proper construction of this same allotment bill. This was another Government suit to restrain State taxation. The court then had before it the decision in the *Allen* case, 179 Fed., 13, and expressly followed it. In construing the Osage allotment bill the court said:

> "If the language of an act is doubtful, the circumstances attending its adoption are proper aids to construction."

The court alluded to the reservation of all the oil and gas and mineral rights, and took judicial notice of the lease to the plaintiff in error herein, its scope and effect. While deciding and holding that there was a manifest intent on the part of Congress to permit the taxation of certain interests of allottees in portions of the allotted lands, it was careful to add the following:

> "By this holding, however, is not meant that the interest in the minerals reserved to the tribe is subject to taxation. Every sale of this interest is declared unauthorized, and it must be immaterial whether accomplished by the voluntary act of the allottee or by the involuntary process of taxation. The reservation of this interest for the use of the tribe is an instrumentality, not only employed by the United States in carrying out a Government policy, but expressly reserved from sale for the period of 25 years."

The foregoing language is substantially the same as used by this court in dealing with the coal-mining situation in the Choctaw Nation (235 U. S., 298).

It would indeed hardly be possible to enlarge upon the language of the Supreme Court of Oklahoma in recognition of the exclusive control and jurisdiction of Congress over the subject.

*Gleason et al.* v. *Wood*, 28 Okla., 502.
*Jefferson* v. *Winkler*, 26 Okla., 653.

By the terms of the enabling act for the admission of Oklahoma to statehood and of section 3 of the constitution of the State of Oklahoma it is provided:

> "SEC. 3. The people inhabiting the State do agree and declare that they forever disclaim all right and

> title in and to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States."
>
> (34 Stat., 270.)

Coming now to the consideration and proper construction of the original lease and the contract with the sublessees within the 680,000 acres, it appears at a glance that they come squarely within the rule laid down by the Supreme Court of the State of Oklahoma as to what property rights are granted thereby.

> "Oil and gas while in the earth, unlike solid minerals, are not the subject of ownership distinct from the soil, and the grant of the oil and gas therein, is a grant, not of the oil that is in the ground, but of such a part as the grantee may find, and passes nothing except the right to explore for the same under the terms of such contract."
>
> *Frank Oil Company* v. *Bellevue Co.*, 119 Pac., 260.
>
> *Kolachny* v. *Galbraith*, 110 Pac., 902.

In the latter case the court said:

> "Such leases are simply grants of a right to prospect for oil and gas, no title vesting until such substances are reduced to possession by extracting the same from the earth—an incorporeal hereditament."

But in any event this right, license or privilege possessed by the Indian Territory Illuminating Oil Company and its said sublessees to enter upon tribal property and drill for oil

cannot be taxed. If any part of the property of said lessees is taxable, it would only be its physical properties, its pipe lines, casing, derricks, etc., employed in the oil and gas business. The company, being a Federal agent under said lease and transacting business between the Government and the Osage tribe of Indians, is charged with the burden of a high Federal policy or business. Such business, license, privilege or franchise is not the subject of State taxation.

*California* v. *Central Pac. R. R. Co.*, 127 U. S., 1; 32 L. Ed., 150.

*Union Pac. R. R. Co.* v. *Peniston*, 18 Wall., 5; 21 L. Ed., 787.

*Western U. Tel. Co.* v. *Texas*, 105 U. S., 460; 26 L. Ed., 1067.

*Farmers' Bank* v. *Minnesota*, 232 U. S., 516 (decided Feb. 24, 1914).

*Choctaw, etc., R. R. Co.* v. *Harrison*, 235 U. S., 292 (decided Nov. 30, 1914).

*M., K. & T. R. R. Co.* v. *Meyer*, 204 Fed., 140.

*McAlester, etc., Coal Co.* v. *Trapp*, 43 Okla., 510; 141 Pac., 794.

*Thomas* v. *Gay*, 169 U. S., 264.

In *California* v. *Central Pac. R. R. Co.*, *supra*, this court held that the State Board of Equalization of California acted without authority in including in their assessment franchises conferred by the United States for constructing a railroad from the Pacific Ocean across the State as well as across the territory of the United States; that the assessment of these franchises was repugnant to the Constitution and laws of the United States and the power given to Congress to regulate commerce among the several States. Franchises conferred by Congress cannot, without its permission, be taxed by the States. The court found that the assessment made by the State Board of Equalization on the value of the company's stock included the full value of all franchises and cor-

porate powers held and exercised by the defendant. In *Farmers' Bank* v. *Minnesota, supra,* the State sought to impose a tax on bonds issued by municipalities in the Indian Territory and Oklahoma Territory. This court held that said Territories were instrumentalities and agencies of the Federal Government established by Congress for the government of the people within their borders, with authority to subdelegate the governmental power to the several municipal corporations therein; that the bonds issued by these municipalities were not subject to State taxation, no matter where held, and that the issuing of municipal bonds by the cities in these two Territories *was the performance of a governmental function within the established doctrine.* The court said:

> "But we deem it entirely clear that a tax upon the exercise of the function of issuing municipal bonds is a tax upon the operations of the Government, and not in any sense a tax upon the property of the municipality. And to tax the bonds as property in the hands of the holders is, in the last analysis, to impose a tax upon the right of the municipality to issue them."

The court quotes and approves the following argument of Mr. Chief Justice Marshall in *McCulloch* v. *Maryland:*

> "The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burthen on the operations of the Government. It may be carried to an extent which shall arrest them entirely."

The tax sought to be collected by the State of Minnesota on the municipal bonds of cities of the Indian Territory and the Territory of Oklahoma was assessed after the State of Oklahoma was admitted into the Union, and the argument was made that Indian Territory and Oklahoma Territory

had ceased to exist as Federal agencies. The court said there was nothing in this argument and made the following very pertinent comment, to wit:

> "Presumably the municipal credit was enhanced and the terms of the municipal borrowing rendered more favorable, by the understanding that the bonds, being obligations of an agency of the Federal Government, would be exempt from taxation by the several States. The value of the bonds in the market was presumably thereby increased. Indeed, the State court in the present case very plainly declares (114 Minnesota, 109) that bonds of the municipalities of the territories, if not taxable by the State, command a higher price on the market than bonds of the municipalities of the States. To deprive bonds of the former description of their immunity from State taxation, and this because of the subsequent action of Congress in erecting the territories into a State, with or without an assumption by the new State of the obligations of the former Federal agency, would be in effect to impair the obligation of the contract; and this is so inconsistent with the honor and dignity of the United States that such an intent should not be presumed without the clearest legislative language requiring it."

The reasons why Government bonds are exempt from State taxation are the same reasons precisely why this lease contract is exempt from State taxation. The application is too clear for dispute, and it is unnecessary to prolong the argument. When this lease was made, in 1896, it was non-taxable, and when renewed for ten (10) years, in 1906, it was non-taxable. If the present lease can be taxed by the State, a renewal of this lease can be taxed also. Likewise, if the United States, upon the expiration of this lease, should lease to another person or corporation, the new lease will be subject to State taxation if the old lease is subject to State taxation. Yet it must be admitted that the United States can negotiate a more favorable lease for the Osages

if it is non-taxable. As said by Mr. Chief Justice Marshall in *Weston* v. *City Council of Charleston* (2 Pet., 449, 468):

> "The right to tax the contract (*the lease contract*) to any extent, when made, must operate upon the power to borrow (*the power to make the lease and negotiate an advantageous contract for the Osages*) before it is exercised, and have a sensible influence on the contract (*on the lease*). The extent of this influence depends on the will of a distinct government. * * * It may be carried to an extent which shall arrest them entirely."
>
> [The words in italics are interpolated by us.]

In *Choctaw, etc., R. R. Company* v. *Harrison, supra,* this court had under consideration the gross-revenue tax imposed by the State of Oklahoma upon coal miners or producers equal to a specified percentage of the gross receipts from the total coal produced. It was held that such act was an occupation or privilege tax which cannot be exacted from a Federal instrumentality, acting under congressional authority, such as the corporate lessee, under the authority of the Curtis act of June 28, 1898, of coal mines upon segregated and unallotted lands belonging to the Choctaw and Chickasaw Indian tribes. This case is directly in point. Among other things, the court said:

> "Neither State courts nor legislatures, by giving a tax a particular name, or by the use of some form of words, can take away our duty to consider its real nature and effect."

That the Supreme Court of Oklahoma has never regarded legislation of this character in its true light, nor apprehended the full import of constitutional restrictions upon and inhibitions against State interference with Federal control over Federal business, can plainly be seen from a reading of the decision of said court in the case of *McAlester-Edwards Coal Co.* v. *Trapp* (141 Pac., 794). This court having, however, in the *Harrison* case, *supra,* referred

to the holding of the State court and to the opposite conclusion reached by the Federal court for the Western District, and repudiated the former, further discussion is unnecessary if, indeed, it would not be impertinent.

There is a more recent and interesting controversy over the subject, which is the outgrowth of the legislation passed in March, 1915, by the Oklahoma legislature. This act provides for a gross-production tax on oil and gas leases in the State of Oklahoma in lieu of all other forms of taxation. The Supreme Court, having decided that oil and gas leases were not taxable in the case of the Indian Territory Illuminating Oil Company, the subject of reaching this species of property by the State legislature has been a very interesting one. In this last act it is provided that whenever such mining operation "is so carried on and conducted through a Federal agency that the State has no authority to impose and collect therefrom a gross-production tax, that as to all such persons, etc., shall be taxed on an *ad valorem* basis and not subject to the gross-production tax provided to be levied in this act."

This act is before the Supreme Court of the State of Oklahoma at present in the case of "*In re* Gross-Production Tax of the Wolverine Oil Company" (not published), decided October 12, 1915. There is a motion for a rehearing pending at the time of writing this brief. With reference to leases in the Osage Reservation, the court in this opinion said:

> "In the leasing of the lands of the Osage Nation, for oil and gas, as well as in the making of such leases on the restricted lands of certain of the allottees of the Five Civilized Tribes, the Department of the Interior, acting pursuant to lawful warrant, has in behalf of these Indians, whom Congress has regarded as dependent and in need of the Government's aid and protection, assumed full and complete jurisdiction and control during the period of dependency. This form of general guardianship is

exercised because of the duty owing these dependent people that these vast oil and gas deposits underneath their lands may be developed and marketed, and those lawfully entitled thereto given the benefit thereof. As was said in the Harrison case, the instrumentalities made use of by the General Government are the lessees of such land, or their duly authorized assignees. More need not be said in this connection for the question is foreclosed by the opinion in the Harrison case. The limitation upon the State's power in this regard is expressly recognized by the act itself, and by counsel who say that the State cannot levy an occupation or privilege tax upon a Federal instrumentality acting under congressional authority."

## PART SECOND OF ARGUMENT.

### Some Comments on the Last Decision of the State Court in Connection with the Federal Agency Question Discussed in Part One.

The facts and issues in this case before the Supreme Court of Oklahoma warranted the court in holding that the leases of the plaintiff in error had been comprised in the assessment of $500,000, so that the question of the power of the State to tax property of that character was before it. The court held oil and gas leases not taxable under the statutes of the State of Oklahoma, separate and apart from the land.

Ther was no conflict in the testimony before the Referee—there was no suggestion of any—there was not even cross-examination. The full value of the physical properties of the plaintiff in error, as a going concern, was admitted, $106,665.12. Its operation of four thousand acres for oil production and value thereof were admitted. It was twice testified that the value of all said leases, governmental grants, licenses, etc., including its physical properties, was

$500,000. The lease has but a short period of time to run. All this Company's property, tangible and intangible, is in this Osage lease. All its stock investment is in this lease and in Oklahoma. It has no investment of capital stock or property in any other State.

The Referee looked at the matter squarely, and held that the franchises, grants, licenses, leases, and intangible property of the plaintiff in error in the Osage Reservation were not immune on the ground of Federal agency. His report fully covers the ground and put the question squarely up to the Supreme Court of the State of Oklahoma.

In its first decision said court fully met all questions as presented by the evidence and the Referee's report. It found oil and gas leases taxable, separate from the physical properties of the producers in Oklahoma, because such rights and privileges as are usually conveyed in oil and gas leases granting permission to go upon the lands of the lessors and prospect for oil were taxed against the plaintiff in error in this case. The intangible right was confessedly sought to be reached by the State Board and the Referee. The question was in the case. The decision would not be *obiter*.

Likewise as to the question of Federal agency, the court dealt with that controversy at length.

But in the second opinion, there was a change of language, but not of result to plaintiff in error. The court reversed itself as to the power of the State to value and assess for taxation oil and gas leases, because the question was fairly in the case before the court, the leases of the plaintiff in error having been valued and assessed by the State Board and the Referee. Therefore the last decision on this point was not *obiter dictum*.

Yet the Supreme Court of the State of Oklahoma allowed the judgment and decision to stand against the plaintiff in error in this case when all its leases, rights, charter, and intangible property had been assessed, and relieved all the other oil companies in Oklahoma from a similar burden.

This company is thereby subjected to an excessive assessment of nearly $400,000, covered by its lease and intangible rights of property.

In thus holding the plaintiff in error under the judgment in this case, and relieving all the other companies, the court indulged in some language which, with all due respect, we have found difficult to understand. Nor do we believe it will be at once wholly clear to this court. For instance, while admitting that all the property and business of the Company is in the State of Oklahoma under said lease, evidence is quoted to show that it has paid 1 per cent on its entire capital stock from its said business, and it is said that although less than one-seventh of its capital stock is invested in the State, the business in the State pays 1 per cent or more on its entire capital stock. The court also declared that it was not prepared to say that the findings of the Referee were not supported by sufficient evidence.

There is no question about the findings of the Referee or the evidence, and the Referee's valuation of $500,000 on the entire business needs no analysis. It was unnecessary for the court to find a key to a mystery created by itself. The court appeared to desire to open another door, but upon opening the same it is found that we are in the identical room we first occupied.

In the State of Oklahoma the capital stock of a corporation which has been invested in tangible property, real and personal, is not subject to taxation separate and distinct from the property. If the company owns any of its own stock, it may be assessable. But proceedings to tax the corporation itself upon its outstanding stock are not permitted by the laws of the State.

*Weatherford Milling Co.* v. *Duncan*, 140 Pac., 1184.

Of course the court did not intend to do this, nor did it question the value of the physical properties of the Company

as admitted in the record and returned by the Referee at $106,665.12. The findings of the Referee were confirmed.

A key may be found to the intentions of the court by the fact that in the first opinion the State court said that the Referee found the total value of all the property of the Company, including its tangible and intangible property, on the first day of February, 1911, to be $500,000 (Record, p. 213). In the second opinion, when the court comes to that point in the statement of facts, it used the following language in stating the findings of the Referee: "That the total valuation of said company's *stock* on the first day of February, 1911, was $500,000." Of course the Referee did not find any such value in the *stock* alone, but taking this as a cue we may readily ascertain the drifting of the court below. This becomes all the more clear when we follow up the reasoning of the court.

The court said that the manner of assessing corporate property, as a general proposition, was to take the value of the capital stock as being presumptively the actual measure of its property or by assessing the property specifically on estimated value. It is very plain to be seen that the difficulty in arriving at the intention of the court below is dependent upon the use of the word *"property"* by the court. The court believed that the income of the plaintiff in error, as indicated by dividends, revealed a species of *property* that was subject to taxation and not within the Federal rule against State taxation of a Federal agency. That is to say, the court attempted to draw a distinction between physical properties of the Company, valued, as the same should be, considering the corporation as a going concern, and the intangible assets of the Company known as oil and gas leases, but that over and above these two property rights there was another that could be reached by taxation, *which would be the income, production, dividends, revenues, and profits coming from all the properties after the same had been severed.*

This appears clearly when we read subdivision No. 9 of the

opinion, where the court deals with the Federal agency question, and concludes as follows:

> "As the authorities sustaining this view of the case are collected in *McAlester-Edwards Coal Co.* v. *Trapp*, 141 Pac., 794, recently handed down, but not yet officially reported, it will be sufficient to refer to that case as controlling on this phase of the case at bar."

The case cited by the court, in which it defined property rights that could be taxed under the decision of the Supreme Court of the United States, and yet not violate the rule we are discussing, was, however, completely overturned by this court in *Choctaw, etc., R. R. Co.* v. *Harrison*, 235 U. S., 292.

We will not discuss the reasoning in the *Trapp* case save to say that it is the sole basis for the conclusions of the State court in the case at bar.

If the court intended to assess the stock of the company at its full value of $500,000, such valuation would comprise all the leases and privileges belonging to it as well as the good will and business, thus bringing the case squarely within the condemnation of this court.

*California* v. *Central Pac. R. R. Co.*, 127 U. S., 1.

As by its second opinion the court had held the Indian Territory Illuminating Oil Company to the judgment and affirmed the finding of the Referee in a case where oil and gas leases were plainly involved in any valuation which could be placed upon its property in excess of $106,665.12, and at the same time had relieved oil and gas leases as such from direct taxation, the Attorney General of Oklahoma immediately moved the court, in a motion for a rehearing, to the effect that the court give the State some further idea or instructions as to what was meant in its decision, so that the Attorney General might proceed against other corporations in like situation with the Indian Territory Illuminating Oil Company. Therefore the Attorney General, in his motion for a rehearing, stated:

> "Second. If this honorable court should hold that oil and gas leases are not taxable as such in the names of the lessees, except in the instances where such leases are owned by corporations and enter into and form a part of the estimate of the value of the capital stock, surplus and undivided profits of such corporations, the State asks that it be decided by this court whether such leases for the purposes aforesaid shall be assessed in the counties, townships and school districts where the property covered by such leases is situated, or at the principal place of business of such corporations" (Record, p. 240).

Of course the plaintiff in error made a motion for rehearing. Both motions were denied. The Attorney General received no elucidation from the court. The judgment stands against this particular oil and gas company.

This decision is without other bearing in the jurisprudence of the State of Oklahoma than as record evidence of a liability against the plaintiff in error. It lays down no new rule which could be followed by the office of the Attorney General in subjecting other corporations to like burdens, and apparently suggested no rule for the guidance of the legislature of the State.

We find that the case was practically disregarded as a rule of action by State officers and the legislature. Therefore in attempting to reach the same kind of property rights as are comprehended in oil and gas mining leases, the legislature passed the act of March 11, 1915 (Session Laws 1915, p. 18). This act was passed after the decision of the Supreme Court of the United States in the *Harrison* case, and expressly omits from the purview of the act all *instrumentalities or agencies that might be legally classed as Federal agents charged with a Federal duty.*

## PART THIRD OF ARGUMENT.

**The plaintiff in error was denied the equal protection of the laws of the State of Oklahoma as guaranteed to it by the Fourteenth Amendment to the Constitution of the United States.**

This question is raised by the fourth, sixth, seventh, and eighth assignments of error.

That a corporation is a person, within the meaning of the Fourteenth Amendment, is no longer open to discussion. The equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special object for discrimination and hostile legislation.

*Pembina Milling Co.* v. *Penn.*, 125 U. S., 181.
*Southern R. Co.* v. *Greer*, 216 U. S., 400.

The provisions of the Fourteenth Amendment relate to and cover all the instrumentalities by which the State acts, so that the conduct of legislative, judicial, and executive officers of the State are subject to analysis in determining whether this right has been violated.

The judicial act of the highest court of the State, in authoritatively construing and enforcing its laws, is the act of the State.

*Twining* v. *New Jersey*, 211 U. S., 78.
*Chicago R. Co.* v. *Chicago*, 166 U. S., 226.

By stipulation in this case the evidence or statement of Mr. Brennan was allowed to be presented before the Referee, as follows:

> "The proposition to assess the Indian Territory Illuminating Oil Company on its intangible assets, or lease, aside from its physical properties as an asset which should have been assessed anyway, and upon which taxes should be paid regardless of the

public-service nature of the business—was a new question in the case as far as he was concerned, and thereupon the witness stated that the Indian Territory Illuminating Oil Company paid all its taxes on its physical properties and its gross-production tax the same as any other oil company in the oil and gas fields in Oklahoma, and that the witness did not desire the referee to understand that said company was neglecting to pay taxes to any less extent than any other oil company and that the manner adopted and pursued by the Indian Territory Illuminating Oil Company in returning its property for assessment locally, viz., on its physical properties only and by paying the gross-production tax was customary throughout the oil and gas bearing fields—that some of the sublessee companies in the Osage were worth more than the Indian Territory Illuminating Oil Company, and that all said companies would escape the particular burden imposed in this case, if such rule were followed as to this company. That the witness was familiar with the manner of the assessment of oil companies in Osage, Washington, and Tulsa counties particularly, and that he was interested as counsel in the tax ferret cases pending which involve this very question" (Record, p. 206).

The testimony showed without contradiction that some of the sublessee oil companies under the Indian Territory Illuminating Oil Company enjoyed larger revenues and profits in the Osage Reservation than did the plaintiff in error. The companies were actually named in the evidence and one was valued at $7,000,000 and mentioned as not paying one-third of the taxes assessed against the plaintiff in error, if the rule in this particular case was allowed to stand as an exception. The Standard Oil Company, the Prairie Oil & Gas Company and the Barnsdall Oil Company were mentioned (Record, p. 92). The peculiar manner by and through which the plaintiff in error was dragged before the State Board of Equalization as a public-service corporation, when its gas business was only subsidiary to its oil business, and when, as a part of the same proceedings, the State

board of assessors attempted to assess against the company the value of all its oil and gas leases in the Osage Reservation, was a proceeding by and through which the plaintiff in error would be subjected to an assessment and valuation on intangible properties different from any other oil and gas company in the State of Oklahoma.

Therefore there was duly filed the sixth, seventh, and eighth assignments of error. The sixth assignment charged error by the court in holding and deciding that the action of the State board of assessors, in imposing a tax burden upon the plaintiff in error, which was not imposed upon other corporations in like position, was valid, and that it did not deprive the plaintiff in error of the equal protection of the laws.

The seventh assignment of error is based upon the discrimination against the plaintiff in error by the court in upholding an alleged assessment against the capital stock of said Company when the capital stock of no other Company was subjected to such assessment.

The eighth assignment of error is based upon the action of the court itself in denying to plaintiff in error the equal protection of the laws for the reason that its oil and gas leases or the revenue, profits and income therefrom are held subject to taxation by the Supreme Court of Oklahoma, while all other companies and individuals owning like leases are exempted therefrom (Record, p. 5).

Assessing the franchises and other property of certain corporations at a different rate and by a different method from that employed for other corporations of the same class, for the same year, which results in enormous disparity and discrimination, denies the equal protection of the law guaranteed by the Constitution of the United States, Amendment Fourteen.

*Chicago Union Traction Co.* v. *State Board of Equalization* (C. C., 1902), 114 F., 557.
*Chicago Consol. Trac. Co.* v. *Same, Id.*
*Raymond* v. *Chicago Union Tract. Co.*, 207 U. S., 42.
*Raymond* v. *Chicago Edison Co.*, 207 U. S., 42.

In the petition to the Supreme Court of the State of Oklahoma, on which is based the appeal from the State Board of Equalization, this proposition that the plaintiff in error was denied the equal protection of the laws by such proceeding was particularly set forth in subdivision #3 of said petition (Record, p. 11).

## PART FOUR OF ARGUMENT.

**The action of the State court deprives the Indian Territory Illuminating Oil Company of its property without due process of law.**

This question is raised by the third assignment of error, as follows:

> "Third. The Supreme Court of the State of Oklahoma erred in holding and deciding that the action of the State board of assessors in assessing the lease, rights, and privileges granted to the Indian Territory Illuminating Oil Company by the Osage tribe of Indians, and renewed by act of Congress, was not in violation of section 1 of article 14 of the Constitution of the United States as depriving it of its property without due process of law" (Record, p. 5).

In support of this proposition, the argument with reference to the fourth, sixth, seventh, and eighth assignments of error, embraced in the last preceding subdivision of this brief, are resubmitted. The authorities there cited seem to us equally applicable here and to support also this assignment. We cannot believe that any proceedings so discriminatory in their application and unequal in their results can be regarded as according due process within the meaning of the Constitution.

## CONCLUSION.

It has been well held by the Supreme Court of the State of Oklahoma in numerous cases that oil and gas leases are mere grants of a right to enter upon lands to prospect for oil and gas, no title vesting until such substances are reduced to possession by extracting the same from the earth—an incorporeal hereditament. The lease extension granted to the plaintiff in error by act of Congress over 680,000 acres of land in an Indian reservation gave to the plaintiff in error precisely the same character of right and title as expressed and defined in those decisions. No person or corporation had any right to enter upon said Reservation unless permitted to do so, directly or indirectly, by act of Congress. The plaintiff in error was granted an extraordinary privilege, license, franchise, or right, and was under serious obligations to the Government of the United States as administrator for the Osage Indian tribe. It appears that the activities of the company under such charter were of a pioneer character, covering extensive areas of undeveloped territory, and that the monetary interest of the tribe depended upon the manner in which the activities were carried on and the extent to which production and development were secured. The evidence is clear that the company possessed $106,665.12 of physical properties at an admittedly fair valuation as a going concern; that it has secured oil in remunerative quantities from said lease, and that the gas discovered was utilized in operating for oil at a net loss as far as the gas was concerned. It appears that nearly $400,000 of the total valuation of the properties of the Company, tangible and intangible, were represented by this oil and gas lease obtained from the Government, and the development and production obtained thereunder from which the royalties, income, and dividends were obtained. When the Supreme Court of the State of Oklahoma finally decided, in its second

opinion, that oil and gas mining leases in said State, no matter where located, were not subject to assessment and taxation, under the statutes of the State, it would have been far better, far more simple, far more logical, and far more consonant with equity and justice if the State court had also concluded in very simple language that the net result of its determination, in reversing its former opinion, was to find that oil and gas leases, and production and profits therefrom, in the Osage Reservation were not subject to taxation and, therefore, reverse the conclusion of its Referee and the determination of the State Board of Equalization.

In such event this case, as it now appears among the decisions of the Supreme Court of the State of Oklahoma, would not stand as it does—a judgment against a single company, but affording no rule by which any other company can be similarly held.

It is therefore urged upon this honorable court that the decision and judgment complained of is wrong, and ought to be reversed. We ask that it be so ordered.

Respectfully submitted,

JOHN H. BRENNAN,
PRESTON C. WEST,
*Attorneys for Plaintiff in Error.*

(30286)

Office Supreme Court, U. S.
FILED
MAR 14 1916
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IN THE

# Supreme Court of the United States

October Term, 1915.

No. 988.

INDIAN TERRITORY ILLUMINATING OIL COMPANY, Plaintiff in Error,

vs.

STATE OF OKLAHOMA, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

IN THE

# Supreme Court of the United States

October Term, 1915.

No. 283.

INDIAN TERRITORY ILLUMINATING OIL COMPANY, Plaintiff in Error,

*v.*

STATE OF OKLAHOMA, Defendant in Error.

***IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.***

## ANSWER BRIEF OF DEFENDANT IN ERROR.

### Statement of Case.

By writ of error to the Supreme Court of the State of Oklahoma, this case presents for review by this court the final judgment of the Supreme Court of the State of Oklahoma, affirming the report of the referee in the matter of the assessment of the property of the Indian Territory Illuminating Oil Company for taxation for the year 1912. Said company is a corporation organized and chartered under the laws of the State of New Jersey, and as such corporation authorized to transact business in the State of Oklahoma. Pursuant to Act of Congress of February 28, 1891 (26 Stat. 794), and the Act of the Osage Coun-

cil of March 14, 1896, and by virtue of authority vested by its charter, the said company, on March 16, 1906, entered into a contract with the Osage Tribe of Indians, through James Bigheart, Principal Chief of said tribe, for a ten years' oil and gas lease on certain lands belonging to the Osage tribe, aggregating about 680,000 acres. For the year 1912 the State Board of Equalization assessed the properties of said company at five hundred thousand dollars. The company appealed from the action of said board to the Supreme Court of the State of Oklahoma. The Supreme Court appointed a referee to take testimony and report findings of fact and conclusions of law. The findings of fact and conclusions of law reported by the referee to the Supreme Court were affirmed. Upon petition and application of the company, plaintiff in error here, a rehearing was granted by the Supreme Court of Oklahoma modifying some phases of the original opinion, but affirming the report of the referee and holding the assessment of the properties of said company at five hundred thousand dollars to be valid under the law and sustained by the testimony taken by the referee, the essential difference between the original opinion and the opinion on rehearing being that in the original opinion it was held that oil and gas leases, as such, constitute property as defined by the Constitution and Statutes of the State of Oklahoma, and as such was subject to taxation by said State, while the opinion on rehearing held that oil and gas leases, as such, were not defined as personal property subject to taxation under the Statutes of Oklahoma, and, therefore, could not be taxed as such, but that under the statutes the value of the capital stock of said company could be taken into consideration by the State Board of Equalization in assessing the properties of said company and that the evidence taken before the referee was sufficient to sustain the assessment made by the State Board of Equalization, and

from the judgment of the Supreme Court of the State of Oklahoma in said opinion on rehearing the plaintiff in error brings the case here on writ of error.

## Statement of Issues.

Eight separate assignments of error are presented by the plaintiff in error, but these are grouped and presented under four separate heads, to-wit: First, "The whole assessment is void because of the inclusion therein of the business, franchises, grants, and leases belonging to plaintiff in error and granted by Act of Congress in a matter within its exclusive jurisdiction"; Second, That plaintiff in error was a Federal agent under the said oil and gas lease contract, and that its properties could not be legally taxed without imposing a burden upon a Federal agency; Third, "The plaintiff in error was denied the equal protection of the laws of the State of Oklahoma as granted to it by the Fourteenth Amendment to the Constitution of the United States"; Fourth, "The action of the State Court deprives the Indian Territory Illuminating Oil Company of its property without due process of law."

## Argument.

We will discuss these four propositions in the order presented. It is contended by plaintiff in error under the first proposition presented that the whole assessment is void because it included franchises, grants, and leases granted to plaintiff in error by an Act of Congress. In the first place, this contention is wholly unwarranted and unsupported because no Act of Congress ever specifically granted to plaintiff in error any franchises, rights, or privileges, but the Act of Congress which plaintiff in error doubtless has in mind and upon which it relies, namely, the Act of February 28, 1891 (26 Stat., 794), merely authorized the leasing of certain of the Osage

lands by the authority of the Osage Indian Council, the Act in question being as follows: "Provided that where lands are occupied by Indians who have bought and paid for the same and which lands are not needed for farming or agricultural purposes and are not desired for individual allotments, the same may be leased by authority of the Council speaking for such Indians for a period not to exceed five years for grazing or ten years for mining purposes in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior." This statute is not a grant of any authority, franchise, or privilege to any particular person or corporation, and is merely a permit to the Osage Tribe, authorizing such tribe to lease to any person or any number of persons upon the approval of such lease contract by the Secretary of the Interior.

In the second place, if it were a fact, which we do not concede, that certain non-taxable franchise were included in the assessment complained of, that of itself would not invalidate the entire assessment unless such non-taxable franchise or privilege constitute the sole element of value upon which the assessment was based. The record discloses the fact that included within this assessment were something over $106,000 of tangible assets, plainly subject to taxation. Plaintiff in error does not question the right of the State to tax its tangible properties if same had been assessed without including the franchises complained of by plaintiff in error. Hence, if it be true that non-taxable franchises were included, this of itself should not invalidate the entire assessment but would merely require this court to so modify the final judgment of the Supreme Court of Oklahoma as to eliminate the non-taxable franchises and permit the assessment to stand as

to the tangible assets which plaintiff in error does not contend the State had no right to tax.

*Second:* Under part second of the plaintiff in error's argument, it is contended that plaintiff in error as lessee of the Osage Indian lands was an agent of the Federal Government, whose functions were to develop and enhance the value of tribal lands, and that in developing such lands the plaintiff in error was merely acting as a Federal agent in carrying out the policies and performing the functions of the Federal Government. With this contention we can not agree. In fact its utter unsoundness is apparent on its very face, for if it were true that plaintiff in error did occupy the relation of agent of and for the Federal Government, then we would find this strange condition that for a stipulated consideration to plaintiff in error the Government had contracted with its own agent for and on behalf of its wards, the Osage Indians, and that plaintiff in error would occupy the dual relation of acting for its principal and for itself in the same transaction. This is contrary to the very fundamental philosophy of law and in direct opposition to the elementary rules which govern the actions and define the relations between principal and agent. The facts are that plaintiff in error occupies the position of an independent contractor, acting for itself and in its own behalf, in a contract with the Osage Indian Tribe. The contract, in fact, was not made by the Government or between the Government and the plaintiff in error. The Government is not a party to the contract, but, under the terms of the contract, page 167 of the record, James Bigheart, as Principal Chief of the Osage Tribe, acting for and on behalf of said tribe, is party of the first part, and Edwin B. Foster, acting for himself and on his own behalf, is party of the second part. The moving consideration in the contract is that a certain per cent of the oil obtained

should be paid to the Osage Tribe as a royalty or as rental, and that a certain stipulated price per year for each gas well should be paid to such tribe and that all the remaining profits should belong to and become the property of the said Edwin B. Foster, whose rights were subsequently transferred to plaintiff in error here. The Government had no right and claimed no right to any portion or percentage of plaintiff in error's share of the products. Hence, we insist that the relation of principal and agent did not exist and that the contention of plaintiff in error is without merit.

*Third:* The third contention of plaintiff in error is that it was denied the equal protection of law, guaranteed by the fourteenth amendment to the Constitution of the United States. This contention is based upon the assumption that certain privileges, franchises, and rights were included in the assessment made against plaintiff in error by the State Board of Equalization and not included in the assessments made by such Board against other companies and corporations engaged in the same character of business. This contention is not borne out by the record. The record does not disclose what elements of value were included within the assessments made by the Board of Equalization or considered by such Board in assessing the property of other like corporations. We deem it unnecessary, therefore, to notice further this contention.

*Fourth:* Under the fourth proposition presented by plaintiff in error, it is claimed that the taxing of plaintiff's properties in the manner complained of was taking its property without due process of law. This contention, as we view it, is also without merit. Due process of law has been defined by this court as follows: "The essential elements of due process of law are notice and an opportunity to be heard and to defend in an orderly

proceeding adapted to the nature of the case." *Simon* v. *Craft*, 182 U. S. 427; *Twining* v. *New Jersey*, 211 U. S. 78; *Jacob* v. *Roberts*, 223 U. S. 261; *Standard Oil Co.* v. *Missouri*, 224 U. S. 270; also the celebrated case of *Dartmouth College* v. *Woodward*, 4 U. S. (L. Ed.), 627.

## Conclusion.

In conclusion, we respectfully submit that none of the contentions of plaintiff in error are sustained either by the law or by the facts disclosed by the record, and that the final judgment of the Supreme Court of the State of Oklahoma is fully sustained by both, and that such judgment should be affirmed by this court.

All of which is very respectfully submitted.

S. P. Freeling, Attorney-General,
Jno. B. Harrison, Assistant Attorney-General,
J. H. Miley, Assistant Attorney-General,
of the State of Oklahoma,
*For Defendant in Error.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1915

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**No. 283**

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INDIAN TERRITORY ILLUMINATING OIL COMPANY,
*Plaintiff in Error,*

*v.*

STATE OF OKLAHOMA, *Defendant in Error.*

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## IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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## ANSWER BRIEF OF DEFENDANT IN ERROR

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S. P. FREELING, *Attorney-General,*
JNO. B. HARRISON, *Assistant Attorney-General,*
J. H. MILEY, *Assistant Attorney-General,*
*For Defendant in Error.*

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## ANSWER BRIEF OF DEFENDANT IN ERROR.

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By writ of error to the Supreme Court of the State of Oklahoma, this case presents for review by this Court the final judgment of the Supreme Court of the State of Oklahoma, affirming the report of the referee in the matter of the assessment of the property of the Indian Territory Il-

luminating Oil Company for taxation for the year 1912. Said company is a corporation organized and chartered under the laws of the State of New Jersey, and as such corporation authorized to transact business in the State of Oklahoma. Pursuant to Act of Congress of February 28, 1891 (26 Stat. 794), and the Act of the Osage Indian Council of March 14, 1896, and by virtue of authority vested by its charter, the said company, on March 16, 1906, entered into a contract with the Osage Tribe of Indians, through James Bigheart, Principal Chief of said tribe, for a ten years' oil and gas lease on certain lands of said tribe, aggregating about 680,000 acres. For the year 1912 the State Board of Equalization assessed the properties of said company at five hundred thousand dollars. The company appealed from the action of said board to the Supreme Court of the State of Oklahoma. The Supreme Court of said State appointed a referee, as provided by a law of said State, to take testimony and report findings of fact and conclusions of law. The findings of fact and conclusions of law reported by the referee to the Supreme Court were affirmed by an opinion of said Court, ————————Okla. ——— Pac. ————. Upon petition and application of the company, plaintiff in error here, a rehearing was granted by said Court, and subsequently an opinion rendered by said Court modifying some phases of the original opinion, but affirming the report of the referee and holding the assessment of the properties of said company at five hundred thousand dollars to be valid under the law and sustained by the testimony taken by the referee, the essential difference between the original opinion and the opinion on rehearing being that in the original opinion it was held that oil and gas leases, as such, constitute property as defined by the Constitution and Statutes of the State of Oklahoma, and as such was subject to taxation by said State, while the opinion on rehearing held that

oil and gas leases, as such, were not defined as personal property subject to taxation under the Statutes of Oklahoma, nor by the Constitution of said State, and, therefore, could not be taxed as personal property; but that under the statutes the market value of the capital stock of said corporation could be taken into consideration by the State Board of Equalization in assessing the properties of said company and could be properly considered as an element of value in assessing said properties, and that the evidence taken before the referee as to the amount of the capital stock of said company and the market value thereof, together with its tangible assets, was sufficient to sustain the assessment made by the State Board of Equalization. From the judgment of the Supreme Court of the State of Oklahoma in said opinion on rehearing the plaintiff in error brings the case here on writ of error.

## STATEMENT OF ISSUES PRESENTED.

While eight separate assignments of error are presented by the plaintiff in error, these assignments are grouped and presented under four separate heads, to-wit: First, "The whole assessment is void because of the inclusion therein of the business, franchises, grants and leases belonging to plaintiff in error and granted by Act of Congress in a matter within its exclusive jurisdiction"; Second, "That plaintiff in error was a Federal agent under the said oil and gas lease contract, and that its properties could not be taxed without imposing a burden upon a Federal agency"; Third, "The plaintiff in error was denied the equal protection of the laws of the State of Oklahoma as guaranteed to it by the Fourteenth Amendment to the Constitution of the United States"; Fourth, "The action of the Supreme Court deprives the Indian Territory Illuminating Oil Company of its property without due process of law."

## ARGUMENT.

We will attempt to discuss these four propositions in the order presented.

First: It is contended by the plaintiff in error that the whole assessment is void because it included certain franchises, grants, and leases granted to plaintiff in error by a special Act of Congress. This contention is wholly unwarranted and unsupported either by the facts disclosed by the record or by the Act of Congress upon which plaintiff in error relies for its special grant of authority. The act in question being the Act of February 28, 1891 (26 Stat., 794) which act is as follows: "Provided that where lands are occupied by Indians who have bought and paid for the same and which lands are not needed for farming or agricultural purposes and are not desired for individual allotments, the same may be leased by authority of the Council speaking for such Indians for a period not to exceed five years for grazing or ten years for mining purposes in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior." It will be observed that this act is a general grant of authority, not to plaintiff in error, or to any other particular individual, but a statute authorizing the Osage Tribe of Indians, acting for itself through a specific act of such tribe of Indians, to lease certain of its grazing lands for a term of 5 years, and certain of its mining lands for a period of ten years, upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior. The act in question was not intended to be a grant of authority to plaintiff in error, or to other persons, authorizing them to lease such Indian lands, but was a specific authorization to such tribe of Indians, authorizing them to contract with whom they pleased for

the leasing of their lands upon such terms and conditions as the agent in charge of such reservation might recommend, subject to the approval of the Secretary of the Interior. Upon the authority of said Act of Congress, the Osage Indians in Council Assembled passed the following act, to-wit:

"WHEREAS, it is known that other Indian Natons have for many years and do now receiv e a very considerable revenue from the development of substances of commercial value found on their reservations, and

"WHEREAS, it is believed by the Osage people that the reservatton held by them in common is rich in similar commodities, which it is their desire to develop, and

"WHEREAS, one Edwin B. Foster, of New York City, N. Y., has made application to the Osage National Council for the privilege of prospecting and boring for Petroleum and Natural Gas upon the Osage Reservation, and proposes to enter into a contract for that purpose upon terms that will not be detrimental to the agricultural interests of the country and which would increase the revenue and enhance the value of our common property should such prospecting result in the discovery of the said Petroleum or Natural Gas, now therefore,

"Be it enacted by the Osage National Council assembled at their Council House at Pawhuska, Oklahoma, this 14th day of March, 1896, that James Bigheart, principal Chief of the Osage Nation, be and he is hereby authorized to enter into a contract with the said Edwin B. Foster for the development of Petroleum and Natural Gas, only, upon the Osage reservation. and he is hereby instructed to make the said contract on the form prescribed by the Interior Department to meet the requirements of law governing such leases, for a term of ten years, with the privilege of renewal for a term of ten years more at the

expiration thereof, if the results of said lease prove satisfactory and upon the approval of the Agent in charge, subject to the approval of the Commissioner of Indian Affairs and the Secretary of the Interior.

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| THOMAS MOZIER, Nat. Secretary. | SAUCY CHIEF, his X mark Pres. Council. |
| JOHN MOZIER, Nat. Int. | JAMES BIGHEART. Prin. Chief. |

I certify the above a true copy of the original as passed by the O. N. Council on the date therein mentioned.

H. B. FREEMAM,
Lt. Col. & Act'g Agent.

Upon the grant of authority to the Osage Tribe by the Act of Congress, Supra, and by the foregoing Act of the Osage Indian Council, James Bigheart, as the principal Chief of the Osage Nation acting for and on behalf of his tribe, entered into a lease contract with Edwin B. Foster, of New York, whereby approximately 680,000 acres of the lands belonging to the Osage Tribe were leased, the lease contract (Rec. p. 167) being in words and figures as follows:

## Exact Copy of Original Lease.

WHEREAS, It is known that other Indian Nations have for many years and do now receive a very considerable revenue from the development of substances of commercial value found on their reservations, and

WHEREAS, It is believed by the Osage people that the reservation held by them in common is rich in similar commodities, which it is their desire to develop, and

WHEREAS, One Edwin B. Foster, of New York City, N. Y., has made application to the Osage National Council for the privilege of prospecting and boring for Petroleum

and Natural Gas upon the Osage reservation, and proposes to enter into a contract for that purpose upon terms that will not be detrimental to the agricultural interests of the country and which will increase the revenue and enhance the value of our common property should such prospecting result in the discovery of the said Petroleum or Natural Gas, now, therefore,

Be it enacted by the Osage National Council assembled at their Council House at Pawhuska, Oklahoma, this 14th day of March, 1896, that James Bigheart, principal Chief of the Osage Nation, be and he is hereby authorized to enter into a contract with the said Edwin B. Faster for the development of Petroleum and Natural Gas, only, upon the Osage reservation, and he is hereby instructed to make the said contract on the form prescribed by the Interior Department to meet the requirements of law governing such leases, for a term of ten years, with the privilege of renewal for a term of ten years more at the expiration thereof, if the results of said lease prove satisfactory and upon the approval of the Agent in charge, subject to the approval of the Commissioner of Indian Affairs and the Secretary of the Interior.

THOMAS MOZIER,
Nat. Secretary.

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SAUCY CHIEF, x
mark
Pres. Council.

JOHN MOZIER,
Nat. Int.

JAMES BIGHEART,
Prin. Chief.

I certify the above a true copy of the original as passed by the O. N. Council on the date therein mentioned.

H. B. FREEMAN,
Lt. Col. & Act'g Agent.

MINING LEASE.

OSAGE AGENCY, OKLAHOMA TERRITORY.

.....1896

LEASE OF

.....

.....

FOR PROSPECTING AND MINING FOR OIL AND GAS UPON THE OSAGE RESERVATION, OKLAHOMA.

MINING LEASE.

THIS INDENTURE OF LEASE, IN TRIPLICATE. Made and entered into on this 16th day of March, 1896, by and between JAMES BIGHEART, party of the first part, for and on behalf of the OSAGE TRIBE OF INDIANS, occupying and residing upon the OSAGE RESERVATION IN OKLAHOMA TERRITORY, under and pursuant to the action of the Council of said Tribe, speaking for the Tribe, duly authorizing the said James Bigheart to contract for the lease of the whole of said reservation, for the period of ten years, for mining purposes, for the production of PETROLEUM and NATURAL GAS only, and duly empowering the said James Bigheart, for and on behalf of said Tribe, to make and execute a lease of said reservation lands, as per resolution of the OSAGE NATIONAL COUNCIL, hereto attached and made a part of this agreement, and in accordance with the provisions of Sec-

tion 3 of the Act of Congress approved February 18, 1891, (26 Stats., 794) as amended by the Act of August 15, 1894, (28 Stats., 305) and Edwin B. Foster, party of the second part, WITNESSETH:—

That the said party of the first part, for and in consideration of the payments to be made by said party of the second part, as herein agreed and stipulated, and by authority of the Action of said National Council, and the said Acts of Congress, does by these presents lease and grant unto the said party of the second part, his heirs, executors, administrators, and assigns, the exclusive right for mining purposes as therein specified, for the period of ten years from the date of approval thereof by the Secretary of the Interior, the following described lands, to-wit: All the lands in Oklahoma Territory known as the OSAGE INDIAN RESERVATION, for the sole purpose of prospecting for and drilling wells for and mining and producing PETROLEUM and NATURAL GAS only, with the right to use so much of the surface of said lands and so much of the timber, building stone, water, wood, gas or other material found thereon as may be fairly necessary for fuel and with which to construct all dwelling houses, buildings or other improvements upon said land that may be properly needed in order to successfully conduct said prospecting and mining operations; also the right of way over and across said land to any point desired to prospect upon and to any point where drilling, boring or prospecting or operating under this lease shall be carried on; and the right of way and right to construct and operate such pipe lines or roadways as may be reasonably necessary to carry on and successfully prosecute the objects of this indenture.

And the said party of the second part, his heirs, executors, administrators, assigns and sub-lessees, for, and in consideration of the privilege of conducting the mining opera-

tions as herein provided for, upon the lands hereinbefore described, for the period of time herein stated, hereby covenant and agree to pay the National Treasurer of the Osage Nation, for the use and benefit of said Tribe of Indians, the following royalties, to-wit: One-tenth (1-10) of all crude Petroleum mined or procured from said lands as the same is delivered free in tanks at the wells or places where produced; and Fifty Dollars ($50.00) per annum for each Gas well that may be discovered and utilized, so long as said well is used by said party; said royalty to be based upon the market value of the products produced at the place of production, and to be paid to the NATIONAL TREASURER OF THE OSAGE NATION, for the use and benefit of the Osage Tribe of Indians as aforesaid, in cash, at the office of said Treasurer. And said second party further agrees to make settlements of accounts with said Treasurer, on account of ROYALTIES as herein provided for, between the first and tenth day—both inclusive—of the months of January, April, July and October of each year during the term of this lease. And the party of the second part, his executors, administrators and assigns, covenant and agree that this indenture is made with the express proviso that if any of said rents or royalties shall remain unpaid for thirty days after the same shall have become due and payable as herein provided for, or if said second party shall use the premises for any purpose save that hereinbefore authorized and agreed upon, or shall commit waste or suffer it to be committed on said premises, or misuse or fail to take proper care of the same, or shall pay or surrender said rents and royalties to any person other than the person herein named, or his duly authorized deputy, or shall fail to exercise such reasonable diligence as good business principles and the market shall demand in prosecuting said prospecting and mining operations on the said land, and in good and work-

manlike manner, or shall fail to keep and perform any and all other agreements and covenants contained in this indenture, then, in case of any such default and if such default shall continue for thirty (30) days after written notice thereof to said lessee, his successors or assigns, then this lease shall thereupon expire at the option and election of the Osage Nation as expressed by the National Council, with the approval of the Secretary of the Interior, without other notice or demand from said party of the first part upon the party of the second part, and said party of the first part may re-enter upon said premises and repossess and recover the same to all intents and purposes as though said parties of the second part had never occupied the same, and without such re-entering and without demand for rent, said party of the first part may take possession thereof in the manner prescribed by law relating to proceedings in such cases.

And it is further mutually agreed and understood by and between the parties hereto, that the OSAGE NATION reserves all right it hath and its citizens have, to cultivate, graze, and improve, and to lease for farming, grazing and mining purposes, other than for the mining purpose herein named, all and every part of the lands contained in said reservation, subject to the limitation herein contained, and such right shall not be interfered with or disturbed by the party of the second party, his heirs, executors, administrators or assigns, except to such an extent as may be actually and absolutely necessary in prospecting for and in conducting and marketing the products herein named; and said second party and those acting under, through or by him, shall not prospect for or drill or bore any wells for the production of the substances herein mentioned within or upon any cultivated enclosure on said reservation without the written consent of the person occupying such premises, duly

acknowledged before the U. S. Indian Agent of the Osage Agency.

And it is further expressly agreed between the parties hereto, that the Osage Nation shall have the right to the free use of Gas for all Government, school and other public buildings of the Nation from any well or wells that may be discovered on said land; and this right shall also extend to all citizens of the Nation for domestic purposes; Provided that no expense shall be incurred by the party of the second part in piping Gas for such purposes. And said second party, in consideration of the covenants herein contained, further covenants and agrees not to remove from said lands any buildings or improvements erected thereon during the term of this lease; but said buildings and improvements shall become a part of the land and shall remain thereon and become the property of the Osage Nation as a part of the consideration herein provided for: Provided that all engines, derricks, tools and machinery shall remain the property of the party of the second part.

But it is also further expressly provided between the parties hereto, that in case of failure on the part of the party of the second part to pay the rents and royalties as herein specified, the Osage Nation shall have a lien upon all buildings, improvements, engines, derricks, tools and machinery erected upon or brought upon said lands by the said second party to secure the payment of rents and royalties.

And the said second party further agrees and covenants to exercise such diligence in conducting said prospecting and mining operations as shall be consistent with good business principles, and to open and operate mines and wells for the products above indicated in a good and workmanlike manner; to commit no waste upon said lands and to suffer no waste to be committed thereon; to take good care of the same and to surrender and return the premises at the expiration of this lease to the Osage Nation in as good condi-

tion as when received, ordinary wear and tear in the proper use of the same for the purposes herein indicated, and unavoidable accidents, excepted. And it is further expressly agreed that if prospecting hereunder shall not be begun within six months after the approval of this lease by the Secretary of the Interior, or if one or the other of the products herein mentioned be not discovered in paying quantities within eighteen months after such approval, or in case of the failure of the party of the second part for a period of six months at any one time to conduct prospecting or mining operations hereunder, then, in either of said cases, this lease shall terminate, and the party of the second part shall have and exercise no further rights hereunder.

And it is further agreed between the parties hereto that the said second party shall keep a true and accurate record and account of said mining operations, showing the whole amount of Petroleum mined and produced hereunder and the number of Gas wells bored and the number in operation, with dates of boring and operating, and that the Osage Nation through its proper officers, the U. S. Indian Agent, of the Osage Agency, the Special Indian Agent and Indian Inspectors of the Interior Department, or such other persons as may be designated by the Commissioner of Indian Affairs, or the Secretary of the Interior, shall at all times have the right to make such reasonable examination of the books, accounts, records and papers of the party of the second part, or those claiming under him, as may be necessary to enable them to obtain all information desired as to the amount of Petroleum mined and produced hereunder and as to the number of Gas wells bored and the number that have been operated and utilized together with the dates of boring and using. And it is also further provided that the said party of the second part shall enter into a good and sufficient bond, with at least two sureties, in the sum of $5,000, payable to the Secretary of the Interior for the use and

benefit of the Osage Nation, conditioned upon the faithful performance of the conditions of this lease, which bond shall be approved by the Secretary of the Interior. It is also provided that this lease shall become operative only after its approval by the Secretary of the Interior.

And it is further expressly provided that the said party of the second part, or those claiming under him, shall not maintain any nuisance on said reservation and shall not sell or give away, or permit their employes to sell or give away any intoxicating liquors on said reservation during the term of this lease; and that he or they will not use the premises for any other purposes than that authorized in the lease.

And it is agreed and understood between the parties hereto that the privilege of conducting mining operations hereunder is permitted and agreed to upon the express condition that if the Indian title to any portion of the lands used and occupied by the lessee, his heirs or assigns, shall be extinguished before the expiration of the time herein stated, then and in that event this lease shall be void and of no force and effect with reference to the lands to which the title shall be extinguished, from and after the date of such extinguishment; and the lessee shall be subject to removal therefrom upon sixty days' notice from the Secretary of the Interior, in his discretion; Provided that the extinguishment of the title herein mentioned shall not apply to lands which shall be allotted in severalty to the Indians, so as to effect this lease to the lands so allotted, but in case any such lands are so allotted, then the royalties accruing on the same shall be paid to the allottees, respectively, instead of to the National Treasurer of the Osage Nation.

It is further provided between the parties hereto that no member of or delegate to Congress, or officer, agent or employe of the Government shall be admitted to any share or part in this lease, or derive any benefit to arise therefrom.

IN TESTIMONY WHEREOF, the said parties of the first and second parts have hereunto set their hands and seals the day and date first above named. All erasures and interlineations having been made before signing.

Witness:

FRED MORRIS. JAMES BIGHEART, (SEAL)
EUSTACE WHEELER. Prin. Chief.

Witnesses:

E. C. GORDON. EDWIN B. FOSTER. (SEAL)
JAMES S. GLENN.

On this 16th day of March 1896, personally appeared before me, H. B. Freeman, Lt. Col. 5th Inf. Acting U. S. Indian Agent of the Osage Agency, the above mentioned JAMES BIGHEART..... and the above named .....personally known to me to be the identical persons named, and acknowledged the signing and sealing of the above indenture of lease, for the purposes therein named, to be their free act and deed.

H. B. FREEMAN,
Lieut. Col. 5th. Inf., Acting U. S. Indian Agent.

INTERPRETER'S CERTIFICATE.

I, JOHN MOSIER, do hereby certify that I am the Official Interpreter of the Osage Nation; that I fully and truthfully interpreted and explained the foregoing lease to the Osage Nation Council, before the signing and sealing thereof, and am satisfied that they clearly and fully understood the nature of said lease and all the terms thereof before authorizing the said....JAMES BIGHEART .. to execute the same for and on behalf of the Osage Nation: and that I witnessed the signing and sealing thereof on the part of said JAMES BIGHEART.....this 16th day of March, 1896.

JOHN MOSIER,
Official Interpreter,
Osage Nation.

The above lease was renewed as to 680,000 acres for a period of ten years from March 16, 1906, by the Indian Appropriation Act for the fiscal year ending June 30, 1905, approved March 3, 1905, increasing gas well royalty from $50 to $100 per annum and royalty on oil to be fixed by the President. The President's order of June 3, 1905, increased the royalty on oil to one-eighth. The act of March 3, 1905, was re-affirmed by "An Act for the division of the lands and funds of the Osage Indians, and for other purposes," approved June 28, 1906.

STATE OF OKLAHOMA }
WASHINGTON COUNTY. } ss:

Chas. F. Leech, of lawful age, deposes and says that he is Manager of the Indian Territory Illuminating Oil Company, that he has compared the within instrument, and that it is a true and correct copy of a certified copy on file in his office, said copy being certified to by A. C. Tonner, Acting Commissioner of Indian Affairs, as being a true and correct copy of the original on file in his office in Washington, D. C.

CHAS. F. LEECH.

Subscribed and sworn to before me this 26th day of April, 1911.

(SEAL) C. H. CALDWELL, *Notary Public.*

My commission expires Dec. 7, 1912.

**It will be observed by the terms of the foregoing lease contract and by the certificates thereto attached that it was never approved by the Secretary of the Interior, but that it is a straight lease of certain mining privileges granted by the Osage Tribe through its principal Chief, James Bigheart, to Edwin B. Foster for a stipulated consideration to be paid in rentals to the Osage Tribe by said Edwin B. Foster, the balance of all the products of such lands to be-**

long to Foster himself, in which products the Government nor the Indians claimed no interest whatever, and over which products neither the Government nor the Indian Tribe exercised, or pretended to exercise, the least control. There is not a hint in either the Act of Congress authorizing the Osage Tribe to make such contract, nor in the Act of the Osage Tribe authorizing James Bigheart, its principal Chief, to make such contract, nor in the terms or conditions of the contract itself, that Edwin B. Foster was constituted a Federal agent or a Federal instrumentality for the purpose of carrying out the functions of the Federal Government toward its wards, the Osage Tribe. But if it were a fact, which we do not concede, that certain non-takable franchises were included in the assessment complained of, that of itself would not invalidate the entire assessment unless such non-taxable franchises or privileges constituted a sole element of value upon which such assessment was based. The record discloses that the plaintiff in error, sub-lessee of Edwin B. Foster, had certain tangible assets aggregating over $106,000 (Rec. p. 96); that it was also capitalized in the sum of $3,500,000. (See Referee's findings of fact, Rec. pp. 77-78; pp. 8-13, inclusive, plaintiff's in error brief). Hence if it was true that certain non-taxable franchises were included within the $500,000 assessment, this of itself would not invalidate the entire assessment, but merely justify this Court to so modify the final judgment and opinion of the Supreme Court of Oklahoma as to eliminate such franchises as the Court might find to be non-taxable, and to permit the assessment to stand as to the tangible assets and the market value of the capital stock which the State Board of Equalization had authority under the law to consider as an element of value in estimating the value of such tangible assets. That a State Board of Equalization has such authority has been held by the Supreme Court

of Illinois in O. & M. R. R. Co. v. Webber, 96 Ill. 443-448; Pac. Hotel C . v. Lieu, 83 Ill. 602; State Board of Equalization v. People, 191 Ill. 528, 58 L. R. A. 513; By the Supreme Court of Vermont, 13 L. R. A. 166; People v. Coleman (N. Y.), 12 L. R. A. 762; Commonwealth v. Standard Oil Co., 101 Pa. 119; Commonwealth v. N. Y., etc. Ry. Co., 188 Pa. 169; Commonwealth v. Beck Creek R. Co., 188 Pa. 199; State Board of Equalization v. Goggin, (Ill.), 58 L. R. A. 513; Also by the Federal Court in Western Union Tel. Co. v. Norman, 77 Fed. 13; and by this Court in the State R. R. Tax Cases, 92 U. S. 575; Ky. R. R. Tax Cases, 115 U. S 321; Adams Express Co. v. Ohio Auditors, 165 U. S. 194; and by this Court on rehearing in the same case, 41 L. Ed. 683. Also the folowing decisions by this Court will throw light upon the subject of what subjects of ownership constitute property and what is meant by the term 'property' in the taxing statutes of the various states.

In Re. Tiburchio v. Parrott (U. S.), 1 Fed., 481,-506.

Butchers Benevolent Asso. v. Crescent City Live Stock Landing & Slaughter House Co., 83 U. S , 36.

Scranton v. Wheeler, 179 U. S., 114; 45 L. Ed., 126

Close v. Noye, (N. Y.), 41 N. E., 570.

Carter v. Hammett, (N. Y ), 12 Barb., 253, 263.

Pause v. City of Atlanta, (Ga.), 26 S E., 489.

Fisher v. Cushman, (U. S.), 103 Fed., 860; 43 C. C. A., 381; 51 L. R. A., 292.

Wright v. Southern Ry. Co., 63 Ga., 783.

Security Sav. Bank v. City of San Francisco, 132 Cal., 599.

Sav. & Loan Soc. v. City of San Francisco, 131 Cal., 362.

County of Santa Clara v. So. Pac. R. Co., (U. S.) 83 Fed. 385.
Northwestern Mutual Life Ins. Co. v. Lewis and Clark County, 72 Pac. 982, 28 Mont. 484.

Also the following cases from this Court will set additional light on the question of power of states to tax the property of an agent of the Federal Government, and what constitutes property within the taxing powers of a state, to-wit:

Thomas v. Pac. Ry. Co., 9 Wall., 579.
R. R. Co. v. Reniston, 18 Wall., 5.
Tel. Co. v. Texas, 105 U. S. 460.
Utah & Northern Ry. Co. v. Fisher, 116 U. S. 28.
Western Union Tel. Co. v. Moss, 125 U. S. 531.
Ficklin v. Shelley Cty. Taxing Dist., 145 U. S. 1.
Reagon v. Mercantile Trust Co., 154 U. S. 413.
Postal Tel. Co. v. Adams, 155 U. S. 688.
M. & R. Co. v. Arizona, 156 U. S. 347.
Cent. Pac. v. California, 162 U. S. 91 & 167.
Thomas v. Gay, 169 U. S. 264.
Wagoner v. Evans, 170 U. S. 588.
Balto. Ship Building Co. v. Balto., 195 U. S. 375.
Mont. Catholic Mission v. Missoula County, 20 U. S. 118.

The contention made by plaintiff in error on page 30 of their brief that "The plenary power of Congress over all the lands and property of the Osage Indian Tribe will be admitted" and the authorities cited following such quotation are not in point with any issue involved in this cause. The defendant in error does not contend that Congress does not have exclusive jurisdiction over the tribal lands of the Indians, nor does it claim the right to tax or in any manner restrict the free exercise of the Federal Government over such tribal properties; but in the case at bar the State has

not sought to impose a tax upon any of the properties of the Osage Tribe, but merely seeks to tax the properties of plaintiff in error, in which neither the Government nor such Tribe claims any interest, and over which neither claims or attempts to exercise any control. The State merely claims the right to tax such properties of plaintiff in error as the said State would be required under its laws to protect, and we, therefore, respectfully submit that these leases do not constitute Federal agencies or Federal instrumentalities as they have been defined by this Court in the authorities above cited, and that the taxing of investments, property interest and elements of value which plaintiff in error own in these leases, and which elements of value belong exclusively to plaintiff in error, are plainly taxable as elements of value which must be and are protected by the laws of the State of Oklahoma. It is the primary contention of the State that such values and such ownership of property interests belonging to plaintiff in error as must be protected at the expense of the State government should bear its portion of taxation for the protection it receives from the State, and the contention made by plaintiff in error that any tax upon their properties would to that extent constitute a restriction upon the operation of Federal instrumentalities is wholly without merit. The right of the State to tax or in anywise to impair or restrict the exercise of the privileges and franchises granted by the leases in question is not insisted upon. To impose an occupation or privilege tax upon this company before it could be authorized to exercise the privileges granted under the lease might properly be a restriction upon the operation of a Federal agency; but the taxing of properties which fall to plaintiff in error and in which and to which plaintiff in error owns the exclusive title, and exercises exclusive and absolute control, the State does insist that it has the right to tax. As to whether the properties of plaintiff in error have been overtaxed

does not appear from the record. In the former opinion the Supreme Court of Oklahoma held that the elements of value vested in these leases constituted property which should be taken into consideration in affixing the assessable value of its taxable interest. The latter opinion, while holding that the oil and gas leases, as such, were not made subject to taxation as personal property under the Oklahoma Statutes, did hold, however, that under such statutes the market value of its capital stock could be considered in fixing the assessable value of its taxable interest. In this contention we respectfully submit that such opinion is amply supported both in the original opinion in Adams Express Co. v. Ohio State Auditors, 165 U. S. 194, and in the very able opinion on rehearing, 41 L. Ed. 683.

Second: In part second of plaintiff's in error argument (P. 38 of Brief) they atttmpt to further discuss the question of Federal agency, which we think we have fully answered. We have examined the authorities cited by plaintiff in error on page 33 of brief, and must conclude that they have no application to the real issues involved in this case. The case of Choctaw, etc., R. R. Co. v. Harrison, 235 U. S. 292, and the decisions cited therein and upon which the opinion is based, have no application to this case. In said case the question was whether in an agreement between the Government itself and the Indian Tribes—The Choctaw and Chicasaw Tribes—wherein a definite duty was imposed upon the Government to protect such tribes in the operation of coal mines. The lessees of such mines were instrumentalities, through which the obligation of the Government to said tribes was to be carried into effect, and that they could not be subjected to an occupation or privilege tax by the State. The tax sought to be imposed in the Harrison case was a

gross-revenue tax equal to a specified percentage of the gross receipt from the production of mines in addition to the taxes levied and collected on an ad valorem basis, and this Court did not in that case decide, or pretend to decide, that the elements of value which went to make up the investments which the lessees had in the Choctaw and Chickasaw leases were not taxable.

Third and Fourth: The contention made in part three and part four of plaintiff's in error argument that it was denied equal protection of the law and that its property was attempted to be taken without due process of law is not borne out by the record herein, hence the authorities cited by plaintiff in error have no application here, and we do not feel called upon to answer them. We think that as far as the record goes that plaintiff in error was given protection to that given to all other like companies and corporations, and that its property was not sought to be taken without due process of law, as due process of law has been defined by this Court in

Simon v. Craft, 182 U. S. 427.
Twining v. New Jersey, 211 U. S. 78.
Jacob v. Roberts, 223 U. S. 261.
Standard Oil Co. v. Missouri, 224 U. S. 270; also
Dartmouth College v. Woodward, 4 L. Ed. 627.

## CONCLUSION

In conclusion, we respectfully submit that none of the contentions of plaintiff in error are sustained either by the law or by the facts disclosed by the record, and that the final judgment of the Supreme Court of the State of Oklahoma is fully sustained by both, and that such judgment should be affirmed by this Court.

All of which is respectfully submitted.

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